

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.)

**CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT OF
LIABILITY ON THE FIRST AND SECOND CAUSES OF ACTION**

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* 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).

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By this motion for partial summary judgment, the plaintiffs Shoshone-Paiute Tribes of the Duck Valley Reservation (Tribes) and Cherokee Nation of Oklahoma (Cherokee Nation) seek to establish the liability of defendants on the first and second causes of action!¹ Under these claims, plaintiffs seek damages based on both the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 *et seq.*, “ISDA”) and the parties’ contractual agreements. The Tribes seek to recover for the defendants’ failure to pay the full amount of “contract support costs” required to be paid by law in connection with the plaintiffs’ administration of various federal hospitals, clinics, outpatient programs and medical referral programs. The issue in this motion focuses on whether in fiscal years 1996 (for the Shoshone-Paiute Tribes) and 1997 (for both Tribes) the defendants unlawfully failed to provide the Tribes with “contract support cost” funding specified by law and by contract to cover the full costs of carrying out the government’s health care programs.

As demonstrated below, the ISDA could hardly be clearer that contract support costs are an “entitle[ment],” are “required to be paid,” “shall [be] add[ed] to the contract,” and “shall not be less than the amount determined” under the Act. These unambiguous provisions have been universally interpreted to impose upon the defendants the legal obligation to fully fund such costs. Although the ISDA’s exhaustive legislative history confirms that Congress plainly promised tribes full contract support cost funding through this mandatory language, the defendants contend that Congress at the same time undercut that very promise by a single sentence which neither

¹ The defendants include the United States, the Secretary of the U.S. Department of Health and Human Services and the Director of the Indian Health Service. The proposed class generally includes all other tribes who received less than their full amount of contract support entitlements from 1988 to the present.

addresses the required amount of funding nor receives any mention at all in that history. As we demonstrate below, this devious scheme imputed to Congress by the defendants—promising contract support costs to the tribes only to make that promise illusory—does not withstand scrutiny.²

I. STATEMENT OF FACTS

A statement of material facts as to which plaintiffs believe no genuine issue exists is set forth in Exhibit 1.

II. INTRODUCTION, OVERVIEW AND HISTORY OF THE INDIAN SELF-DETERMINATION ACT’S “CONTRACT SUPPORT COST” PROVISIONS

The Indian Self-Determination Act of 1975 is the cornerstone of this Nation’s modern policy of promoting tribal autonomy and self-governance over the discredited dependence and paternalism of the past. 25 U.S.C. § 450(a). In furthering this enlightened policy, Congress in the ISDA took the remarkable and unprecedented step of requiring the Indian Health Service³ to turn over the direct operation of its federal programs to any Indian tribe that elects to run those programs for its people.⁴ 25 U.S.C. § 450f(a)(1). The Act thus requires the defendants in this

² Concurrently herewith the plaintiffs are filing a separate Motion for Summary Judgment on Plaintiffs’ Third Cause of Action, seeking a declaration that section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, does not affect the defendants’ liability under the first two causes of action. If the Court rules in favor of the plaintiffs on both motions, the parties will then move forward with further proceedings involving class certification and quantification of damages.

³ This brief uses the terms “Secretary” and “Indian Health Service” interchangeably, because the ISDA’s mandates are directed in part to federal Indian programs operated by the Secretary of the Department of Health and Human Services (DHHS), and within DHHS those programs are carried out by the Indian Health Service.

⁴ S. Rep. No. 100-274 at 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 2625 (“There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources”) (hereafter plaintiffs will cite only to the official Report pages, which also appear in U.S.C.C.A.N.). *See also*

case to do the bureaucratically unthinkable: to divest themselves not only of their authority to operate their programs, but of all associated funding as well.⁵

Over the years this policy has been undercut by the defendants' failure to provide tribes with the necessary resources to carry out these programs—resources specifically required by the ISDA and the government's agreements with tribal contractors. By seeking recovery for the defendants' failure, the plaintiff Tribes seek to remedy these broken promises and help ensure the success of this Nation's policy of self-determination.

The mandate of the ISDA is as unequivocal as it is unusual. The Secretary is:

directed, upon the request of any Indian tribe . . . , to enter into a self-determination contract . . . with a tribal organization to plan, conduct, and administer programs or portions thereof . . . [that are provided] for the benefit of Indians because of their status as Indians.

Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 988 F. Supp. 1306, 1316-17 (D. Or. 1997) (pending appeal) (*Shoshone-Bannock I*) (the ISDA requires the agency “to transfer federal programs and funds to tribes on demand” and to determine “whether, and how much, of its own authority and funding must be surrendered to a third party”).

⁵ The district court in *Shoshone-Bannock I*, 988 F. Supp. at 1316-17, noted that in this unique setting,

The Secretary does not merely act as an impartial regulator, but has an obvious conflict of interest when enforcing the ISDEA's mandate to transfer federal programs and funds to tribes on demand. It is difficult to imagine an issue on which an agency would have a greater self-interest

25 U.S.C. § 450f(a)(1)(E) (emphasis added). The directive includes not only federal programs operated in the field, but all administrative functions of the Department “without regard to the organizational level within the department that carries out such functions.” 25 U.S.C. § 450f(a)(1). Thus, since the 1975 enactment of the ISDA, a tribe—and not IHS—chooses whether an IHS program will be contracted to the tribe.

When a tribe assumes operation of an IHS program, the tribe executes a “self-determination contract,” 25 U.S.C. § 450b(j), or a “self-governance” compact,⁶ and the Secretary’s role is generally limited to an annual monitoring of the tribe’s operations. The mandatory form of the self-determination contract is set forth in a detailed “model contract,” 25 U.S.C. § 450l(a), (c), although the precise terms of any given contract (as supplemented by Annual Funding Agreements (AFAs) for each year) are subject to negotiation between the tribe and the government.

The ISDA takes care to assure that the funding for services provided to IHS beneficiaries will not be decreased when a tribe takes over a program. First, the ISDA requires that funding under the contract “*shall not be less* than the appropriate Secretary would have otherwise provided for the operation of the programs.” 25 U.S.C. § 450j-1(a)(1) (emphasis

⁶ As a more autonomous alternative to self-determination contracting under Title I of the ISDA, Congress in 1988 enacted Title III, known as the Tribal Self-Governance Demonstration Project Act, Pub. L. No. 100-472 § 209, 102 Stat. 2285 (1988), reprinted a 25 U.S.C. § 450f note. *See generally* S. Rep. No. 100-274 at 39-40 (discussing Title III). Under that Act, qualifying tribes (including the named plaintiffs) enter into “self-governance compacts” rather than “self-determination contracts.” Under § 303(a)(6), compacting tribes are entitled to receive the same level of funding, including contract support costs, as tribes operating programs under ISDA Title I contracts. Except where the distinction has significance to this case, we will refer to both types of agreements as contracts.

added). In “self-determination” parlance this sum is known as the “Secretarial amount,” *Shoshone-Bannock I*, 988 F. Supp. at 1310, and it is comprised not only of the local program funds that are readily identifiable for a particular tribe, but—if a tribe so requests—also a tribe’s “tribal share” of federal funds for essential supportive activities carried out at the regional IHS Area Office or the central IHS Headquarters level. *Id.* at 1311.⁷

This “Secretarial amount,” however, does not reflect the full cost of providing IHS programs, because many of the administrative resources drawn on by IHS are located in entirely different departments or agencies of the federal government. These include various functions carried out by the Office of Personnel Management, the Merit Systems Protection Board, the General Services Administration, the General Accounting Office, the various Inspectors General, the Treasury Department, and other DHHS agencies.⁸ In addition, the agencies (and various other federal laws) historically have imposed upon tribes additional overhead burdens beyond those faced by the agencies, such as requirements for program reporting, annual financial audits and private insurance. S. Rep. No. 100-274 at 9.⁹ Thus, even if tribes could receive the full amount of appropriated IHS agency funding directly supporting a particular program (the “Secretarial amount”), in the absence of additional funding tribes would still be unable to deliver the same level of services to IHS beneficiaries that IHS could deliver. Indeed, in such circumstances tribes would be compelled to divert federal program funds to pay for these administrative functions, and the ultimate Indian program beneficiaries

⁷ The Secretarial amount is “the amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe.” *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996).

⁸ *See also Ramah Navajo School Bd.*, 87 F.3d at 1341 (describing contract support costs as including “the full administrative costs the Tribe will incur—and which, absent the self-determination contract, the federal government would incur—in connection with the operation of these programs”).

⁹ For a recent and fuller discussion of the administrative costs incurred by tribes that are not included in the Secretarial amount *see generally Indian Self-Determination Act—Shortfalls in Contract Support Costs Need to be Addressed* (General Accounting Office, June 1999) (“GAO Report”, Exh. 2.)

would be “penalized” by a tribe’s decision to operate an IHS program.¹⁰

To offset this “contract penalty,” IHS and the BIA have paid tribal contractors some form of additional contract administration funding—referred to as “contract support costs” (CSC)—since the early years of the ISDA. These payments, however, consistently proved to be woefully inadequate to meet the needs of the tribal contractors. S. Rep. No. 100-274 at 8 (“[t]he consistent failure of federal agencies to fully fund tribal indirect costs¹¹ has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements”); GAO Report, Exh. 38-43, Exh. 2 at 39-44. To make matters worse, IHS even “failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts” (a failure that continues today),¹² although IHS continued to impose administrative requirements on tribal contractors “more stringent than the requirements that are imposed on the Federal agencies themselves.” S. Rep. No. 100-274 at 9. These circumstances left tribes with four options, each of them undesirable, to cover the administrative expense of carrying out these programs: tap into tribal trust fund revenues that would otherwise support much-needed economic development and other tribal assistance programs; cut the level of already underfunded services to tribal members; cut administrative expenses and risk failing to comply with federal requirements and prudent management standards;

¹⁰ GAO Report at 38-43, Exh. 2 at 39-44 (describing the impacts on tribes that do not receive their full contract support cost entitlements, including on page 41 a description of the crisis faced by the plaintiff Shoshone-Paiute Tribes).

¹¹ The term “indirect costs,” although sometimes used synonymously with contract support costs, *see, e.g., Ramah Navajo School Bd.*, 87 F.3d at 1341, technically refers to the largest of three categories of such costs. *Infra* at 12 - 14.

¹² GAO Report 35, Exh. 2 at 36 (noting IHS’s failure to request full funding “since at least 1993”).

or abandon self-determination altogether. *Id.* at 12-13.

Recognizing these circumstances, in 1988 Congress declared that:

Full 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. It observed that:

[T]he 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-determination contracts.

Id. at 8; *see generally* GAO Report 38-43, Exh. 2 at 39-44. It decried the resulting “financial management problems” suffered by tribes, finding that “self-determination contractor’s rights have been systematically violated particularly in the area of funding indirect costs.” S. Rep. No. 100-274 at 8. It instructed IHS to “cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services.” *Id.* at 12.

Congress then addressed the problem head-on by replacing the original Act’s one sentence contract-funding clause with an entirely new and detailed section, specifically requiring IHS to provide tribal contractors a carefully defined amount for “contract support costs” over and above the “Secretarial amount,” and outlawing a raft of past agency schemes and devices for reducing the amounts owed to tribes. *See, e.g.*, 25 U.S.C.A. § 450j-1(a)(2), (b) & (c) (West Supp. 1998);¹³ S. Rep. No. 100-274 at 12. Congress further strengthened these provisions in 1994 to make clear that contract support costs must include “both funds required for administrative and other overhead

¹³ 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 a remaining subsections). *See* Pub. L. No. 105-362, § 801(g).

expenses and ‘direct’ type expenses of program operation,” as well as “start-up costs” and costs incurred in preparing to enter into a contract. S. Rep. No. 103-374 at 8-9 (1994), Exh. 3 at 5. As the accompanying report makes abundantly clear, Congress intended “to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation,” and to stop compelling tribes “to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.” *Id.* at 9.

Simultaneously, Congress recognized that its original broad delegation of authority to IHS to carry out the Act had been a grave mistake, given the agency’s entrenched resistance to the Act’s mandates.¹⁴ It thus enacted a multitude of other amendments in 1988 and 1994 collectively designed to micromanage the agency and to constrain the Secretary’s discretion as much as possible. *See, e.g.*, 25 U.S.C. §§ 450k, 450l(c) (model contract §

¹⁴ Originally Congress in 1975 delegated to the Secretary broad rulemaking authority to carry out the Act, 25 U.S.C.A. § 450k(a) (1983). But “bureaucratic recalcitrance” posed the biggest obstacle to full realization of tribal self-determination, and despite the Act’s mandates IHS and the BIA pursued every possible avenue to frustrate Congress’s objectives. *Shoshone-Bannock I*, 988 F. Supp. at 1315-16 (discussing extensive agency misconduct under the Act).

The record compiled by Congress revealed that IHS and the BIA had consistently refused to fully fund contracts; imposed unpromulgated policies, rules, and restrictions on tribes that impeded and limited contracting; and erected a multitude of other obstacles to full realization of the Act’s self-determination goals. These included (1) the “[i]nappropriate application of federal procurement laws . . . result[ing] in excessive paperwork and unduly burdensome reporting requirements;” (2) the agency creation of an oppressive “contract monitoring bureaucracy;” (3) agency “impos[ition] [of] additional reporting requirements . . . not required under applicable laws and regulations;” and (4) diversion of funds due tribal contractors “to cover federal pay costs, retirement costs and other federal needs . . . for . . . federal computer equipment acquisition and software development costs . . . [and] to pay for federal contract monitoring costs.” S. Rep. No. 100-274 at 7-8; *Shoshone-Bannock I*, 988 F. Supp. at 1315-16 (discussing same as leading to the “massive amendments” of 1988). The 1987 Senate Report stands as a wholesale indictment of the Secretary’s failure to facilitate tribal independence and self-determination, and forms the backdrop against which to assess the Secretary’s actions here.

As a consequence, when IHS and the BIA failed to follow the 1988 Amendments’ mandates to actually publish their requirements as formal regulations, Congress in 1994 “reinforced almost every section of the ISDEA, adopted a model self-determination contract . . . and stripped the Secretary of all her delegated rulemaking authority except for 16 narrow areas.” *Shoshone-Bannock I*, 988 F. Supp. at 1316; *see* 25 U.S.C. § 450k(a)(1). Those areas do not include determining contract support funding levels. *Ramah Navajo School Bd.*, 87 F.3d at 1350.

1(b)(11)) (all restricting IHS's discretion over the contracting process). *See also* S. Rep. No. 100-274 at 8; *Ramah Navajo School Bd.*, 87 F.3d at 1344-45 & n. 9 (discussing the ISDA amendments, noting "Congress has clearly expressed in the ISDA . . . its intent to circumscribe as tightly as possible the discretion of the Secretary" and adding "[p]recisely *because* the Secretary had consistently failed to behave in a reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act"); *Shoshone-Bannock I*, 988 F. Supp. at 1315-17 (case pending) (discussing these measures at length as reflecting a "history of Congressional concern with agency malfeasance"). These amendments greatly narrowed—and almost completely revoked—the general discretion Congress had once granted the Secretary.

In enacting the ISDA and in all subsequent amendments, Congress emphasized that funding under the Act is a mandatory, binding obligation of the federal government. This intent is reflected most obviously by Congress's decision to require the transfer of programs through contracts, rather than grants or some other form of agreement. As the Senate Committee noted in 1987, Congress used the term "contract" "to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party." S. Rep. No. 100-274 at 19. In addition, Congress made self-determination contracts enforceable, just like other federal contracts for goods and services, under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* *See* 25 U.S.C. § 450m-1(d); ISDA Title III, § 303(d), *reprinted at* 25 U.S.C. § 450f note. And Congress made clear that when tribes contract under the ISDA, they are "*entitled*" to receive all funds specified in the Act. 25 U.S.C. § 450j-1(a)(3)(B); *Ramah Navajo School Bd.*, 87 F.3d at 1341, 1345.

Despite these repeated congressional mandates, IHS continues to fail to fund contract support costs fully, or even to seek sufficient appropriations to do so. Instead, the defendants assert that the law does not require the payment of full contract support costs. They have gone so far as to argue that even when IHS has a lump-sum

appropriation available to meet the mandate to pay full contract support costs (as was the case in all fiscal years prior to 1998), the Government still bears no obligation beyond the amount *IHS decides* it will make available—a *position consistently rejected by every court and administrative tribunal to have considered the issue*. See, e.g., *Shoshone-Bannock I*, 988 F. Supp. at 1329-33 and *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 999 F. Supp. 1395 (D. Or. 1998) (“*Shoshone-Bannock II*”) (holding that IHS policy on funding contract support costs as embodied in ISDM 92-2 and IHS Circular 96-04 violated the ISDA, and awarding Tribes damages for unpaid contract support costs);¹⁵ *California Rural Indian Health Bd., Inc. v. Shalala*, No. C-96-3526 DLJ (N.D. Cal., slip op. Aug. 25, 1998) (“*CRIHB I*”) (same), Exh. 13; *Appeals of Cherokee Nation of Oklahoma*, IBCA Nos. 3877-3879/98, 1999 WL 440047 (June 30, 1999) Exh. 15 (same, involving fiscal years 1994, 1995 and 1996). See also *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir. 1997) (“the 1988 amendments to the Act mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts”); *Ramah Navajo School Bd.*, 87 F.3d at 1341 (“in a year in which Congress appropriates sufficient money to cover the Secretary’s CSF obligations, each Tribe is entitled to receive the full amount of its CSF funding”); *Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, IBCA Nos. 3463-3466 and 3560-3562, 98-2 BCA 29,831 and 29,832, 1997 WL 759441 (Dec. 4, 1997) (“*Alamo*”) (BIA liable for full contract support both in years when the agency has a lump-sum appropriation and in years when it has an insufficient earmarked appropriation), *pending on appeal sub. nom Babbitt v. Miccosukee*, No. 98-1457 (Fed. Cir.) (appealed on issue of “earmarked” years only, not lump-sum years).

¹⁵ The district court subsequently awarded attorneys fees under the Equal Access to Justice Act, finding IHS’s defense in lump-sum years not even “substantially justified.” Opinion and Order entered October 16, 1998, No. CV-96-459-ST.

Because of the defendants' misconduct, the plaintiff Tribes and tribes across the country still have not received the full funding promised to them years ago in the ISDA and in their contracts with the United States. Indeed, although the two plaintiff Tribes were paid contract support costs for some of the IHS programs they administered, both the Shoshone-Paiute Tribes and the Cherokee Nation took over the operation of substantial additional IHS programs serving hundreds of thousands of needy Indian people *without receiving any contract support costs at all for carrying out those programs*. As a result, they have been forced to continue bringing this and similar actions to enforce the mandates of the ISDA and the solemn obligations created by their agreements with the United States.

III. STANDARD OF REVIEW

The appropriate standard of review in this case, under both the ISDA and the Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq.*, is *de novo*. Under the ISDA, the CD applies to civil actions arising under self-determination contracts and self-governance compacts, and such actions may be brought in federal district court (25 U.S.C. §§ 450m-1(a) & (d); ISD Title III, § 303(d), *reprinted at* 25 U.S.C. § 450f note), and the CDA provides that a contractor's appeal from the decision of a contracting officer "shall proceed *de novo* in accordance with the rules of the appropriate court." 41 U.S.C. § 609(a)(3). Therefore, this action proceeds *de novo*.

IV. FACTUAL BACKGROUND

A. The Negotiation and Payment of Contract Support Costs under IHS Practice and Policy

The ISDA carefully specifies the essentially administrative costs that must be provided as "contract support costs." 25 U.S.C. § 450j-1(a)(2)-(6). Under these provisions, contract support costs include all "the reasonable costs for activities which must be carried on by a

tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management,” and that are not already included in the Secretarial amount specified in 25 U.S.C. § 450j-1(a)(2). Consistent with the statute, under IHS policy contract support costs are comprised of “indirect costs” and “direct” contract support costs, with the latter subdivided between “recurring” costs and “nonrecurring” direct costs. (“Recurring” direct costs are incurred year after year, while “nonrecurring” direct costs are incurred on a one-time basis, generally just prior to or during the first year of a tribe’s operation of a contract.) Exh. 1 ¶ 7; *see also* GAO Report, Exh. 2 at 17-20.

The ISDA defines the term “indirect costs” as those “costs incurred for a common or joint purpose benefiting more than one contract objective [meaning more than one program], or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved.” 25 U.S.C. § 450b(f). By way of example, such costs typically fund the IHS program’s portion of a tribal financial management system, procurement system and personnel system. The first step in determining the indirect costs IHS will pay is a tribal-federal rate negotiation process that involves dividing the agreed-upon necessary indirect costs to manage all tribal programs regardless of funding source, by the total funding for all those tribally-administered programs. *See generally* GAO Report at 19-20 and Appendix II (“Contract Support Costs and the Process for Setting Indirect Cost Rates”), Exh 2 at 20-21 and 71-80. Then, the resulting ratio, or “indirect rate” (in effect, a “multiplier”), 25 U.S.C. § 450b(g), is multiplied against the “Secretarial amount” (less any appropriate deductions) (the “multiplicand”) to determine IHS’s share of the indirect costs. GAO Report, at 20; Exh. 2 at 21. For a recent use of these colloquial terms, *see Appeals of Cherokee Nation*, Exh. 15, slip op. at 17.

In contrast to “indirect” contract support costs (which are theoretically paid by a funding agencies and pooled together for the joint benefit of all programs), “direct” contract support costs are all those allowable costs that strictly benefit the IHS programs only (rather than all tribally administered programs generally) and that are not otherwise included in either the “indirect costs” or in the Secretarial amount. Exh. 1 ¶ 10. IHS considers such costs to be “recurring” when (like workers compensation insurance on a nurse’s salary) they must be incurred year after year. If they are incurred only on a one-time basis (such as the cost of software to tie a tribal computer system into an IHS system), IHS considers such costs to be “nonrecurring.” Exh. 1 ¶ 11. The amount for each item of direct contract support, whether recurring or non-recurring, is generally negotiated with IHS along with funding for all other categories in the AFA. Exh. 1 ¶ 12.

IHS has generally paid contract support costs in accordance with the policy set forth in two documents: Indian Self-Determination Memorandum (ISDM) 92-2, Exh. 4, and IHS Circular 96-04, Exh. 5. Under this policy, IHS placed two limits on its payment of contract support. First, IHS limited the total amount of contract support costs it would pay in any given year to the amount recommended in committee reports for that purpose. It did so even though none of the appropriations acts (until fiscal year 1998) contained any statutory earmark or cap on the amount IHS could pay from its lump-sum appropriation for contract support. Exh. 1 ¶ 13.

Second, IHS limited total payments to tribes for contract support costs associated with newer IHS programs (that is, programs that had not previously been contracted under the ISDA) to the amount specifically set aside in the annual appropriations act for the IHS “Indian

Self-Determination (ISD) Fund.” Exh. 1 ¶ 13.¹⁶

It distributed this amount through what it called the “ISD Queue.” Exh. 1 ¶ 14; Exh. 6 (four examples of the IHS Queue). The ISD Queue was a list of tribally-contracted IHS programs generally ranked by the fiscal year when a tribe first took over the operation of a program under an ISDA contract. *See also Shoshone-Bannock I*, 988 F. Supp. at 1329 (describing IHS policy); *Appeals of Cherokee Nation*, Exh. 15, slip op. at 9 (same).

Each fiscal year IHS took an amount equal to the ISD Fund and fully paid that year’s contract support costs associated with programs at the top of the ISD Queue, continuing down until IHS exhausted the Fund. Exh. 1 ¶ 16. IHS then removed from the ISD Queue those programs that received contract support, and advanced those programs that did not. Exh. 1 ¶ 16. Under IHS policy, in any given year a program being contracted by a tribe would only be paid contract support costs if the contracted program advanced high enough on the ISD Queue to be covered by that year’s ISD Fund. If not, that year it got nothing. “The net effect is that tribes are never paid CSC funds for prior years and the Priority List has grown.” *Shoshone-Bannock I*, 988 F. Supp. at 1329. The IHS policy of limiting contract support cost payments in these ways was rejected in *Shoshone-Bannock I*, in *CRIHB I*, and most recently in *Appeals of Cherokee Nation*, while a similar BIA position was rejected in *Alamo*.

B. Facts Regarding the Shoshone-Paiute Tribes

1. Background

The Shoshone-Paiute Tribes are a federally recognized Indian tribe with an enrolled

¹⁶ *But see Shoshone-Bannock I*, 988 F. Supp. at 1332 (IHS “has not consistently adhered to even its own dictates” in the relevant IHS circulars).

population of approximately 1,800 members, most of whom live on or near the Duck Valley Reservation, in the remote high desert of northern Nevada and southern Idaho. Exh. 1 ¶ 21. Tribal headquarters and the Tribes' health facility are located in Owyhee, Nevada, just south of the Nevada-Idaho border. The nearest cities to Owyhee are Mountain Home, Idaho, approximately 97 miles to the north, and Elko, Nevada, about 94 miles to the south. The closest major city is Boise, Idaho, located approximately 143 miles north of the Reservation. Exh. 1 ¶ 22.

The Tribes currently employ about 250 full-time or full-time equivalent employees, including 95 positions in the health program. Exh. 1 ¶ 28. The first full-time physician was assigned to the Reservation in 1882. In 1916, work began to convert a school to a five-bed hospital. A second, 12-bed hospital was built in 1936 and used until 1976, when IHS built the 15-bed Owyhee Community Health Facility now in use. Exh. 1 ¶ 29.

In 1988, IHS announced plans to terminate inpatient care at the Owyhee Community Health Facility. The Tribes responded by beginning to study ways to maintain and improve the health services on the Reservation. Exh. 1 ¶ 30. Faced with the threat of losing a inpatient care on the Reservation, at the beginning of FY 1995 (October 1, 1994) the Tribes entered into a self-governance Compact with IHS, Exh. 19, with a plan ultimately to contract for the operation of the IHS hospital and hopefully thereby preserve its full range of services. Exh. 1 ¶ 32.

As a first phase in this process, the Tribes expanded on an existing self-determination contract with IHS (originally entered into October 1, 1991) by contracting to operate the balance of the IHS community health care programs (which includes alcohol aftercare services, public health nursing, the mental health services program, and public health education

services). Exh. 1 ¶ 33. On January 1, 1995, the Tribes shifted these programs over to an AFA under their Compact for the remainder of fiscal year 1995. Exh. 1 ¶ 34.

In FY 1996, the Tribes amended the Compact expanding the IHS programs they administered to include the foregoing community health programs plus all of the available IHS Owyhee Hospital services (namely inpatient hospital services, outpatient clinical services, emergency medical services, pharmacy services, medical records services, medical laboratory services, radiology services, dental services, and “contract health services” provided through contracts with private sector health care providers, as well as property and supply services, housekeeping services, facilities management, and general hospital administration). Since FY 1996 the Tribes have continued to deliver these IHS health services to a total service population of about 4,000 people on or near the Reservation, in a BIA detention center, and in surrounding communities and ranches. Exh. 1 ¶ 35

2. Need for contract support costs and impact of failure to fund

Before taking over the sizable commitment of operating all the health programs on the Reservation, the Tribes carefully negotiated all necessary contract support costs. Manning Aff., Exh. 16 ¶ 12. This was undertaken under both the law and the Tribes’ Compact, which provided that “[t]he total amount of funds . . . that the Secretary shall make available to the Tribes shall be determined in accordance with § 303(a)(6) of Title III,” (Compact, Art. III, sec. 2, Exh. 19 at 19) and that “[s]tartup costs . . . if available shall be included in the Tribes’ Annual Funding Agreement” (Compact, Art. V, sec. 12, Exh. 19 at 27). In the Compact as amended in March 1996 (adding a new section 16 to Article II), the Secretary also agreed to incorporate into the Compact the mandatory funding provisions of ISDA § 450j-1(a), the anti-reduction provisions of §

450j-1(b) (not including the proviso at the end of that section), and the full indirect cost funding provisions of 25 U.S.C.A. § 450j-1(d) (West Supp. 1998). Compact Amendment No. 1, Exh. 22A.¹⁷

For fiscal year 1996 the Secretary agreed in the Tribes' amended 1996 Annual Funding Agreement that the "amounts [that] are available to the Tribes pursuant to the Compact and Title III" include "approved and agreed recurring direct (\$494,517) and non-recurring indirect (\$1,173,149) contract support funds . . . associated with both those programs" [*i.e.*, the recently compacted community health and Owyhee Hospital programs], and \$367,400 in "approved and agreed . . . non-recurring direct start-up or preaward contract support costs in connection with the [same programs]." FY 1996 AFA section 4(a) and nn.1 & 2, Exh. 23 at 8; FY 1996 AF Amendment No. 1, Exh. 26.¹⁸ In fiscal year 1997 the Tribes and IHS agreed simply that "the sum of \$1,847,196 in recurring direct and indirect contract support cost funds associated with those

¹⁷ A similar Compact amendment was executed by the parties in early FY 1997. Exh. 22B. *See also* 25 U.S.C. § 458cc(l) (authorizing tribes operating self-governance agreements under Titles III or IV of the ISDA to incorporate at their option any provisions of Title I).

¹⁸ The specified contract support costs included: (1) recurring direct contract support funds of \$494,517 for the salary and benefits for a business office manager; the fringe benefits, including unemployment insurance, pension plan, and workmen's compensation insurance (15 percent of base salary) for all employees; Health Board travel for quarterly meetings; recruitment of professional staff; phone bills and postage costs; printing and reproduction costs; and legal advisory services; (2) non-recurring contract support costs of \$367,400 for pre-award planning and preparation travel costs; printing and reproduction costs; administrative and health systems development; board training; review of accreditation; purchase of computer systems and software (including accounts receivable software); telecommunications equipment; office equipment; and (3) indirect costs of \$1,173,149 based on the prior year's indirect cost rate of 22.1 percent. Exh. 1 ¶¶ 41-42. The Tribes eventually negotiated an indirect cost rate with the Department of the Interior's Office of the Inspector General (OIG) for FY 1996 of 26.6 percent, Exh. 1 ¶ 44, and a rate of 24.5 percent for FY 1997, Exh. 1 ¶ 49. These agreements were based on a detailed description of the items included in the indirect cost "pool," that is, those items the Tribes and the OIG agreed to allocate to indirect costs benefitting all of the contracts administered by the Tribes, including IHS programs under the FY 1996 and FY 1997 AFAs.

programs,” and \$435,762 in “one-time start-up or preaward contract support funds,” would be “available to the Tribes.” Exh. 1 ¶ 48.

The defendants never paid any of this funding in either year. Instead, they took the position that IHS programs being contracted by the Tribes were not high enough on the ISD Queue to receive funding.¹⁹ They paid no direct contract support costs, and in paying indirect costs they simply deducted from the Tribes’ total Secretarial amount (the direct cost base or “multiplicand”) the amount of the contracted Owyhee and contract health care operations, and then multiplied the relevant indirect rate against this reduced amount. With hardly any contract support costs to administer a multi-million dollar hospital for two years, the Tribes were forced to make substantial cuts both in the programs serving their beneficiaries and in the administration of those programs, directly contrary to the express mandates of the ISDA and the terms of the Compact and AFAs between the Tribes and the United States.²⁰

¹⁹ The ISD Queue updated July 2, 1996, the IHS Owyhee Hospital programs operated by the Shoshone-Paiute Tribes were ranked 7th (for funding in the subsequent fiscal year), and in the list updated September 17, 1997 they were ranked 1st (for subsequent-year funding). Exh. 6. Although IHS paid the tribes *nothing* in contract support costs to operate these programs, IHS continued to provide a small amount of contract support for the limited community health programs covered by the Tribes’ original self-determination contract prior to fiscal year 1995. Exh. 1 ¶ 47 n.4.

²⁰ The shortfall contributed to the Tribes’ inability to fill 27 vacant positions (out of 66 total health care positions). The Tribes lacked the funds to remedy significant deficiencies in the hospital that had developed during IHS’s administration of the facility, including 19 items that needed immediate correction to meet the accreditation requirement of the Fire and Life Safety Codes and 35 items of medical equipment that were in use past their replacement date. The Tribes were also forced to limit contract health care services (that is, funds to purchase services that the Tribes are unable to provide on the Reservation and so must purchase from other providers) to only “Level I Medical Priority Care” involving “Emergent/Acutely Urgent Care Services.” And the Tribes were unable to develop and implement many of the personnel, purchasing, billing, training, monitoring, computer, and other systems necessary for efficient management during the transition period. Exh. 1 ¶¶ 53-56.

C. Facts Regarding the Cherokee Nation

1. Background

The Cherokee Nation is a federally recognized tribe with a tribal enrollment in excess of 200,000 members. Approximately 91,000 members live within the Cherokee Tribal Jurisdictional Service Area (“TJSA”), a 7,000 square mile region in the northeast corner of Oklahoma. Exh. 1 ¶ 59. The capital of the Cherokee Nation is Tahlequah, located in Cherokee County in the southeastern section of the TSJA. Although the Cherokee Nation’s principal government and business office complex is located in Tahlequah, tribal services are provided throughout the TSJA. Exh. 1 ¶ 61. The Cherokee Nation has approximately 1,700 tribal employees (making it one of the largest employers in northeast Oklahoma), about 560 of whom work in the Nation’s Health Services Department. Exh. 1 ¶ 62.

Over the past fifteen years the Cherokee Nation has operated various IHS health care programs under the authority of the ISDA, for the benefit of its members and other eligible Indians. Exh. 1 ¶ 63. Up until fiscal year 1994, the Nation operated a number of IHS programs pursuant to contracts entered into by the parties under the authority of Title I of the ISDA. Exh. 1 ¶ 64. In fiscal year 1994, the Nation began operating these and other IHS programs pursuant to a Self-Governance Compact and associated AFAs. Exh. 1 ¶ 65. Under the terms of its Compact and its FY 1997 AFA, in that year the Cherokee Nation operated five rural outpatient clinics, providing basic outpatient medical care, dental programs, optometry, radiology, mammography,

behavioral health services, medical laboratory services, pharmacy services, community nutrition programs, and a public health nursing program. The Nation also operated the inpatient and outpatient “contract health” (medical referral) programs associated with the IHS Hastings Hospital and the outpatient “contract health” program associated with the IHS Claremore Hospital. Exh. 1 ¶ 66.

Beginning in 1992 the Cherokee Nation and IHS began expanding the IHS programs to be carried out by the Nation (first under its contract, and later under its Compact). The four most recent IHS programs contracted by the Cherokee Nation during this period were the IHS Redbird Smith Health Center located in Sallisaw (Sallisaw Clinic) (FY 1992); the IHS Wilma P. Mankiller Health Center in Stilwell (Stilwell Clinic) (FY 1994); the IHS contract health services outpatient program (CHS-OP) (FY 1995); and the IHS contract health services inpatient program associated with the IHS Hastings Hospital (CHS-IP) (FY 1997). Exh. 1 ¶¶ 67-71. In fiscal year 1997, these IHS programs were operated by the Nation under its fiscal year 1997 AFA, which also incorporated all the mandatory Secretarial and contract support costs funding provisions of 25 U.S.C. § 450j-1(a). FY 1997 AFA, section 15, ¶ 11, subpar. (h), Exh. 39 at 7.

2. Need for contract support costs and impact of failure to fund

In fiscal year 1997, the Cherokee Nation calculated that it was entitled to be paid \$4,442,099 in indirect costs associated with carrying out all of its contracted IHS programs, determined by applying the Nation’s OIG-approved interim indirect cost rate that year of 14.93 percent against the IHS direct cost base. Exh. 1 ¶ 75. But that is not even close to what IHS paid. Rather, IHS only paid \$1,656,151, the specified “minimum amount of funds allocated to the nation.” Exh. 1 ¶¶ 76-77. In an endnote to the FY 1997 AFA the Nation memorialized its

disagreement with IHS's decision to pay the Nation indirect costs without regard to the Nation's indirect cost rate agreement (Exh. 39 at 11, endnote 18), but in the end IHS adhered to its "queue" policy and deducted all four newer programs from the Cherokee's "direct cost base." Moreover, to the extent it actually multiplied the Nation's indirect rate by this unlawfully reduced base, it never even paid the resulting undercalculated amount.²¹ Thorne Aff., Exh. 36 ¶ 24.

In addition, IHS never paid the Cherokee Nation any direct contract support costs (recurring or nonrecurring) for the four newer programs, although the Nation requested—and the local Oklahoma Area Office approved—specific amounts of direct contract support costs for each of these programs. *Id.* As with indirect costs, IHS refused to pay these amounts because the programs were not deemed high enough on the "ISD Queue" to receive a portion of the ISD Fund.²² Once again, an endnote to the FY 1997 AFA captured the parties' disagreement. Exh. 39 at 10 (endnote 9).

The failure to fund full contract support costs in FY 1997 directly impacted the IHS programs operated by the Nation, because direct health care programs were reduced dollar for dollar to the extent of the shortfall. Thorne Aff., Exh. 36, ¶¶ 26-27. The result is that reductions

²¹ The fact that the Cherokee Nation did not even receive its full FY 1997 contract support entitlement for operating the older IHS programs is evident by comparing payments for that year with IHS's own analysis of payments the previous year. According to IHS, in FY 1996 it paid the Cherokee \$1,705,925 in indirect costs, when the Nation's rate was 12.2 percent. Exh. 1 ¶ 78. In doing so (as in FY 1997) IHS subtracted from the "direct cost base" all the more-recently contracted IHS programs. *Id.* By IHS's reckoning it very closely then paid the full amount of the improperly undercalculated indirect cost need associated with the remaining older IHS programs. *Id.* Under IHS's own analysis, it stands to reason that when in fiscal year 1997 the Nation's indirect cost rate was significantly higher, it should have received considerably *more* indirect contract support costs associated with those older IHS programs. Instead, IHS paid *less*.

²² Under IHS's ISD queue updated through August 1998 four more recent IHS programs contracted by the Cherokee ranked 69th, 70th, 72nd, and 100th. Exh. 6 at 4-5.

in funds representing services to thousands of needy Cherokee Indians were diverted to cover the shortfall, precisely the result Congress sought to avoid through the 1988 and 1994 amendments.

V. LEGAL DISCUSSION

A. The ISDA and the Plaintiff Tribes' Contracts Entitle the Tribes to be Paid Full Contract Support Costs Associated with All IHS Programs Administered by the Tribes.

The ISDA could hardly be clearer in its command that tribes carrying out contracts to operate IHS programs are entitled to their full contract support costs associated with those contracts.

Thus § 450j-1(a)(2) requires that contract support costs *shall be added* to the Secretarial amount, and that those costs *shall consist of* specified items. (Emphasis added throughout.) Section 450j-1(a)(3) adds that “the contract support costs that are eligible costs for purposes of receiving funding [under the Act] *shall include*” various funds, with subparagraph (B) adding that these are all funds “that the tribe or tribal organization *is entitled to receive*.” Section 450j-1(a)(5) adds that these are also a part of the *amount[s] required to be paid*” and that the “*shall include*” start-up costs. Section 450j-1(g) then directs that “the Secretary *shall add to the contract the full amount of funds to which the contractor is entitled* under subsection (a).” 25 U.S.C.A. § 450j-1(g) (West Supp. 1998). The model contract echoes these legal mandates b requiring that “the Secretary *shall make available* to the Contractor the total amount specified in the annual funding agreement. . . . *Such amount shall not be less than the applicable amount determined pursuant to section 106(a)* of the [ISDA].” 25 U.S.C. § 450l(c) (§ 1(b)(4)). To the same effect is the Self-Governance Demonstration Project Act, mandating that self-governance agreements *shall* . . . provide for the payment by the Secretaries to the tribe of funds . . . in an

amount equal to that which the tribe would have been *eligible to receive* under contracts and grants under [Title I], *including direct program costs and indirect costs, . . .*” Title III § 303(a)(6), *reprinted at 25 U.S.C. § 450f note.*

These provisions are plain, they are unambiguous, and they have been universal interpreted to impose upon the defendants the legal obligation to fully fund tribal contract support costs incurred in connection with the administration of contracted IHS programs.

The Secretary’s mandatory duty under the ISDA to provide contract support funding has been recognized by all three courts to address the issue, including the Tenth Circuit. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (10th Cir. 1997) (holding that the ISDA “mandate[s] that tribes executing self-determination contracts receive full funding for a reasonable contract support costs associated with self-determination contracts”); *Ramah Navajo School Bd.*, 87 F.3d at 1341 (noting that “Congress drafted the CSF funding provisions in mandatory terms . . . and forbade the Secretary to reduce the amount of funding for virtually any reason except a reduction in appropriations or tribal authorization”); *Shoshone-Bannock I*, 988 F. Supp. at 1329 (holding that “the full amount of CSC funds must be added to the contract”). So, too, has the Interior Board of Contract Appeals, including one case involving the Cherokee and the same Compact (though different fiscal years) at issue here. *See Appeals of Cherokee Nation, supra; Alamo, supra.* *See also* discussion, *supra* at 10 - 11. As detailed earlier, the same duty arises under each of the plaintiff tribes’ compact and funding agreements. *Supra* at 16 - 19 (Shoshone-Paiute Tribes); 20 - 23 (Cherokee Nation).²³

²³ In the Cherokee FY 1997 AFA the parties expressly incorporated all the mandatory Secretarial and contract support cost funding provisions of § 450j-1(a). *See* section 15, ¶ 11, subpar. (h) of the Nation’s FY 1997 AFA, Exh. 39 at 7. In the Shoshone-Paiute Tribes’

It is undisputed that IHS did not pay the plaintiff Tribes contract support cost associated with *any* of the newer IHS programs carried out under each Tribe's compact and funding agreements, and that it did not even pay the Cherokee the full amount of its contract support cost entitlement associated with the older IHS programs. By failing to pay the full amount of contract support associated with the IHS programs operated by each Tribe in the subject year or years, IHS thus breached its statutory and contractual obligations.

In the balance of this Memorandum the Tribes address the arguments advanced by the defendants to avoid liability for these breaches.

B. The ISDA's "Availability of Appropriations" Clause Provides No Defense to the Defendants' Liability for Unpaid Contract Support Costs

At the root of the defendants' failure to pay contract support is the defense that the "availability of appropriations" provision contained in the last clause of 25 U.S.C. § 450j-1(b) excuses the defendant's conduct. But this defense fails for two reasons. First, appropriations *were* available in FY 1996 and FY 1997 to pay the tribes. And second, even if appropriations to IHS had not been available, the defendants would still be liable.

AFAs, as amended, the Secretary further agreed that the "amounts [that] are available to the Tribes pursuant to the Compact and Title III" included "approved and agreed recurring direct (\$494,517) and non-recurring indirect (\$1,173,149) contract support funds . . . associated with [the recently compacted community health and Owyhee Hospital programs]" and \$367,400 in "approved and agreed . . . non-recurring direct start-up or preaward contract support costs in connection with [those programs]." Fiscal Year 1996 AFA, sec. 4(a) and nn.1 & 2, Exh. 23 at 8; Fiscal Year 1996 AFA Amendment No. 1, Exh. 26.

1. The Secretary had “availab[le]” funds with which to pay the mandatory full contract support funding amounts the Tribes were “entitled” to under the Act.

To the extent the defendants defend the decision not to fund the Tribes’ contract support costs on the contention that no appropriations were available in fiscal years 1996 and 1997 from which to meet the ISDA’s mandate to pay the Tribes their contract support entitlement, the are demonstrably wrong.²⁴ In fact in fiscal years 1996 and 1997 the Secretary had ample lump-sum appropriations of roughly \$1.7 billion and 1.8 billion, respectively, from which to do so.²⁵

²⁴ To the extent defendants contend that IHS’s various circulars are in and of themselves sufficient legal authority for refusing to pay, they are equally wrong. As the D.C. Circuit held three years ago, 25 U.S.C. § 450k(a)(1) flatly prohibits the use of unpromulgated policy statements to deprive tribal contractors of their funding rights under the Act

The text of the Act demonstrates that Congress never intended to commit the allocation of [CSC], *full or partial*, to agency discretion, and that the Secretary in this case exceeded the limited scope of his authority in promulgating the new allocation rules.

Ramah Navajo School Bd., 87 F.3d at 1349; *see also id.* at 1350 (holding that Secretary violated the ISDA by relying on an unpublished policy or “nonregulatory requirement”); 25 U.S.C. § 450l(c), model contract § 1(b)(11) (making inapplicable any “program guidelines, manuals or policy directives of the Secretary”) (incorporated by reference into the Shoshone-Paiute Compact and the Cherokee FY 1997 AFA); S. Rep. No. 103-374 at 12 (“the contractor is not subject to the Departments’ manuals, guidelines, regulations or unpublished requirements”); 25 C.F.R. § 900.5 (1996) (“an Indian tribe . . . is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary”).

Indeed, the 1987 Senate Report specifically notes that the regulatory requirements of section 450k were added “to prevent Federal agencies from imposing . . . administrative polic directives such as the Indian Self-Determination Memoranda (‘ISDM’) and the Indian Self Determination Advisories (‘ISDA’) which have been used in the past to impose new conditions on tribal contractors.” S. Rep. No. 100-274 at 20. ISDM 92-2 and IHS Cir. 96-04 thus have no legal significance. An “agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress.” *Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993).

²⁵ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat 1321-189 (1996) (FY 1996); Omnibus Consolidated Appropriations Act of FY

Nothing in those appropriations acts even purported to limit their availability to meet the defendants' legal obligation to pay the Tribes their contract support cost entitlements. And if appropriated funds were legally "available" to pay the Tribes' FY 1996 contract support request, the Secretary had no delegated authority or discretion to refuse payment. *See generally Ramah*, 87 F.3d at 1344-47.

This very issue was first decided in the leading *Alamo* case issued by the specialized Interior Board of Contract Appeals. In considering the availability of the BIA's unrestricted, or "lump-sum," appropriations to pay indirect contract support costs in the context of the ISDA funding mandate (and the similar "administrative costs" mandated by the Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2008), the Board decisively ruled that "the lack of any earmark in an appropriation Act simply means that the Congress does not intend to change whatever prescriptions are already contained in the authorizing statute." *Alamo*, Exh. 14, at 18. The Board concluded that

the restriction in the authorizing Acts, to the effect that the Indian tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, simply does not apply where the current . . . appropriation is in the form of an unrestricted lump-sum amount that is more than sufficient to cover such mandatory funding and where the Department's current appropriations Act lacks an statutory earmark affecting the use of funds for such purposes.

Id. at 20-21; *see also id.* at 5 ("[w]e have concluded that the . . . Tribes are entitled to full payment of their indirect costs, absent clear and specific provisions to the contrary in applicable appropriations Acts").

Only days later, the district court in *Shoshone-Bannock I* independently reached the

1997, Pub. L. No. 104-208, 110 Stat. 3009-212 (1996).

same conclusion in the context of IHS contracts. After noting that the “parties agree that this appropriation of \$7.5 million for the ISD Fund is not an ‘earmark’ or cap on the amount the Secretary can pay for CSC,” *Shoshone-Bannock I*, 988 F. Supp. at 1331, the court held that:

[N]o statutory minimum or maximum was placed on CSC funding [in the appropriations act]. The Secretary simply decided that, pursuant to recommendation of the Committee Report, \$7.5 million was an appropriate sum to be allocated to new CSC for FY 1996
.....

[T]he tentative budget allotment between existing and new CSC relied upon by the Secretary was not carried into the language of the 1996 Appropriations Act. Thus, no statute expressly restricts the Secretary’s ability to shift funds within its general appropriations to pay CSC.

Id. at 1331-32. Indeed, the court ruled (*id.* at 1332) that:

[P]ermitting 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.

Less than three weeks ago the IBCA once again rejected the defendants’ efforts to evade the liabilities established under the ISDA, this time in a ruling involving the Cherokee’s claims for three earlier fiscal years. The Board was brief and to the point:

[W]e must first determine whether the Government would otherwise owe this money to Cherokee.

The simple answer is yes. Apart from section 314, IHS has raised no new issue, invoked no new principle, and asserted no legal argument that the Board did not fully take into consideration when it arrived at its decision in *Alamo*, *supra*, which raised essentially the same issues as those in these appeals. Moreover, every case we know of that has considered these or similar issues, and particularly the issue of whether the language of the ISDA requiring the full payment of indirect costs under self-determination contracts is

mandatory when the agency has received sufficient appropriations to do so, has found that full payment is required and that the Secretary has no discretion in the matter.

Appeals of Cherokee Nation, Exh. 15, slip op. at 15.

The Board then makes five conclusions (*id.* at 16-17), including the following:

[1] In making allocations and disbursements for indirect costs under compacts and contracts pursuant to Title III, when funded by unrestricted lump-sum appropriations, IHS remains bound by the mandatory language of the authorizing legislation and its agreements with Indian Tribes executed pursuant thereto, despite any shortfalls in the total amounts appropriated, because in providing indirect costs under the Act, the Department is performing an essentially ministerial function, and it has no authority to modify administratively the clear statutory mandates giving priority to indirect costs.

[2] Absent a specific revision of the authorizing legislation by either an amendment of the substantive Act or a clear provision in an applicable appropriations Act, the Department has no authority to modify either the direct cost base (multiplicand) by which an indirect cost rate is to be multiplied or the percentage rate (multiplier) determined by agreement with the Inspector General of the U.S. Department of the Interior.

[3] The qualification in the authorizing Act to the effect that the Indian Tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, is not applicable where the current appropriation is in the form of a total lump-sum amount that is sufficient to fully fund such indirect costs, and the then current appropriations Act lacks any statutory restriction on its use for such purposes.

The situation presented by this case and those considered in *Alamo*, *Shoshone-Bannock*, and *Appeals of Cherokee Nation* are legally indistinguishable. As in those cases, the IHS appropriations for FY 1996 and FY 1997 for contract support costs were unrestricted.²⁶ Indeed,

²⁶ The FY 1996 Appropriations Act appropriated the following sums for the Indian Health Service:

these are the very years that were at issue in *Shoshone-Bannock*, as well as one of the years at issue in *Cherokee Nation* (1996). Thus, § 450j-1(b)'s "availability of funds" proviso simply does not apply. The ISDA *mandates* full contract support cost funding "subject to the availability of appropriations," and appropriations were indeed available, because the Appropriations Act imposed no legal impediment to the Secretary's use of each year's lump-sum appropriation to pay these amounts. Borrowing from the IBCA, "before using any funds from its lump-sum [IHS] appropriation for discretionary purposes, the [IHS] has a clear obligation to first give priority to the various mandatory programs and activities of the ISDA . . . , including indirect costs. The Department has no discretion in this matter." *Alamo* at 18.²⁷

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, \$1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service Provided further, That of the funds provided [in the lump sum appropriation], \$7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act. . . .

110 Stat. at 1321-189 (emphasis added). The FY 1997 Appropriations Act is nearly identical, except that Congress increased the Indian Health Service's lump-sum appropriation by nearly \$60 million to \$1,809,269,000. 110 Stat. at 3009-212, 3009-213. As noted in *Shoshone-Bannock I*, 988 F. Supp. at 1330, the 1996 and 1997 Appropriation Acts plainly accomplished but one goal with respect to the \$7.5 million ISD Fund: they set apart a small portion of the larger single-year lump-sum appropriation as a so-called multiple or "no-year" fund, having no fiscal year limitation or expiration date.

²⁷ See also *Shoshone-Bannock I*, 988 F. Supp. at 1332 (Secretary "is certainly required to fund CSC with available appropriated funds before undertaking new discretionary projects or initiatives or permitting funds to lapse to the Treasury"). This result is not surprising.

2. **Even if appropriations had not been available to the Secretary, the defendants would be liable because the ISDA requires the Secretary to enter into binding contracts in advance of appropriations acts for specified amounts, including amounts for contract support costs.**

Even if the Secretary had lacked sufficient funds to liquidate these binding obligations, the defendants would still be liable because that liability operates *independent* of particular appropriations. As the following discussion shows, this argument reflects basic principles of government contracting law.²⁸

We begin by recalling that the ISDA mandates the Secretary to enter into contracts. That much is clear from 25 U.S.C. § 450f(a)(1) (“[t]he Secretary is directed . . . to enter into a self-determination contract or contracts. . .”) The Secretary *must* approve a tribal proposal and award a contract within 90 days of receiving a request unless the Secretary makes a well-

In its well-known “impoundment” cases, the Supreme Court made clear that even executive agencies granted broad discretion (unlike the Secretary under the ISDA) must fully fund statutory beneficiaries to the maximum amount permitted by appropriations, unless Congress expressly delegates the agency “impoundment” authority. *See, e.g., Train v. City of New York*, 420 U.S. 35, 45-48 (1975) (rejecting EPA Administrator’s purported implicit discretion to withhold funds and allot the city less than the entire amount authorized to be appropriated); *Oklahoma v. U.S. Civil Serv. Comm’n*, 330 U.S. 127, 136 (1947) (discussing congressionally “create[d] legally enforceable rights” to certain payments from a federal agency). The Tribes have an equal statutory right to full funding which may be defeated only by a later enacted, countervailing statute. *See, e.g., United States v. Larionov*, 431 U.S. 864, 879 (1977).

²⁸ It appears that in FY 1998, the Secretary lacked sufficient funds due to a statutory “cap” on her ability to make contract support cost payments out of her lump-sum appropriation. *See* Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997); GAO Report, Exh. 2 at 22.

supported finding under one of five carefully limited criteria. 25 U.S.C. § 450f(a)(2). As noted earlier, the Act also mandates the precise funding amounts that must be included in those contracts, describing both the Secretarial amount, § 450j-1(a)(1), and the amount of funding for contract support costs, § 450j-1(a)(2), that are to be “added” to the contract. 25 U.S.C.A. § 450j-1(g) (West Supp. 1998).

The only limitation of any kind is set forth in the last, unnumbered sentence of § 450j-1(b) (hereinafter the § 106(b) availability clause):

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

IHS has long taken the position that this availability clause undermines all of the Act’s other provisions that carefully specify the amount to which tribal contractors are entitled, in particular the amount of contract support. Specifically, IHS has argued that, because of this sentence, the United States’s liability for the full amount of contract support required by the rest of the Act and by the government’s contracts with tribes is conditional on the recommendations of Congressional committees. This position has never withstood judicial scrutiny.

Rather, both tribunals to address this issue have determined in the context of limited agency appropriations that the § 106(b) availability clause specifically limits only *the Secretary’s* authority to disburse funds, not the quantum of *the government’s* underlying liability for a particular dollar amount under the law and a duly authorized contract.²⁹ *Alamo*, slip op. at 45 (“the

²⁹ As discussed *infra* 45 - 49, such availability clauses limiting an agency’s spending authority, but not its authority to enter into binding obligations, are common in statutes conferring contract authority

Government's obligation to fund these indirect costs in accordance with the [self-determination] contract remains intact, despite the dollar ceiling in the applicable appropriation act"); *Ramah Navajo School Bd.*, 87 F.3d at 1345 ("Given the mandatory terms of the Tribes' CSF entitlement under the Act, Congress clearly included the [availability clause] *not to excuse the Secretary's obligation to follow the mandates of the statute*, but rather to make evident that *the Secretary* is not required *to distribute money if Congress does not allocate that money to him under the Act*") (emphasis added).³⁰ These rulings are supported by the plain language of the statute and its legislative history.

- a. **The § 106(b) availability clause, according to its plain language and in harmony with the rest of the statute and the applicable legislative history and regulations, limits the agency's authority to liquidate its obligations, but not the government's liability for the amount of funding specified in § 106(a).**

The plain terms of the § 106(b) availability clause address only the "provision of funds" and the Secretary's duty "to make funds available." The availability clause does not address the "amount of funds provided" under a self-determination contract, for that amount is controlled by subsection (a). The phrase "the provision of" means the "act or process of providing," *Webster's Third New International Dictionary* at 1827 (1976), and "to provide" means, in this context, to "furnish for future use." *Black's Law Dictionary* at 1224 (6th ed. 1990). Thus, the phrase refers to the Secretary's "act of furnishing funds for future use." Similarly, the phrase "make funds available" refers to the Secretary's duty to make funds "accessible," "obtainable," or "present or ready for immediate use." *Black's Law Dictionary* at 135. The availability clause b its terms addresses only the Secretary's ministerial duty to make payments to fund self-

³⁰ Although the *Ramah* court correctly describes the § 106(b) availability clause, in that case the plaintiffs did not seek additional amounts beyond what had been appropriated; they challenged only the manner in which the BIA was mishandling the appropriation it had.

determination contracts.

This “plain-meaning” interpretation accords with the rest of the statute. *See United States Nat’l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (“Over and over we have stressed that ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy’” (citation omitted)).

(1) Comparing the § 106(b) availability clause with § 106(a). In considering the effect of the § 106(b) availability clause on the government's liability to pay a particular “amount,” it is essential to consider the context of the entire statute, which is telling. On the one hand, the § 106(b) availability clause refers to the “provision of funds” and the Secretary’s duty “to make funds available.” In contrast, subsection (a) (emphasis added throughout) unambiguously addresses on several occasions the “amount” of funds the Secretary is “required” to pay and the contractor is “entitled” to receive:

- ◆ “[t]he *amount* of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract,” § 450j-1(a)(1);
- ◆ “[t]here *shall be added* to the amount *required* by paragraph (1) contract support costs which *shall* consist of an *amount* for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management,” § 450j-1(a)(2);

- ◆ contractors “shall have the option to negotiate with the Secretary the *amount* of funds that the tribe or tribal organization is *entitled to receive*” under their contracts, § 450j-1(a)(3)(B); and
- ◆ the “*amount*” of contract support costs “*required to be paid*” shall include startup costs including preaward costs if the Secretary receives prior notice of those costs, § 450j-1(a)(5) & (6).

Similarly, subsection (g) requires the Secretary:

- ◆ to “add to the contract the full *amount of funds* to which the contractor is entitled under subsection (a).” 25 U.S.C.A. § 450j-1(g) (West Supp. 1998).

The repeated and consistent statements that the “amount” “shall not be less than” a specified amount, “shall be added to the” contract, is an “entitle[ment],” and is “required to be paid,” are not only unambiguous; they contrast sharply with the utter absence of any similar language in § 106(b).³¹ Interpreting the § 106(b) availability clause as a limit on the Secretary’s ministerial duty to disburse funds harmonizes these subsections, gives full weight to the Secretary’s mandate in subsections (a) and (g) to pay the specified amount, and recognizes that these sections do not require the Secretary to disburse funds that have not been appropriated or to reduce the recurring funding for ongoing programs.³²

³¹ This distinction is also supported in the model contract at 25 U.S.C. § 450(l). For example, § 1(b)(4) clearly recognizes the distinction between the Secretary’s ability to “make funds available” and the underlying obligation for the amount specified in subsection (a):

Funding amount.--Subject to the availability of appropriations, the Secretary *shall make available to the Contractor the total amount specified in the annual funding agreement Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDA].*

(Emphasis added.) While the Secretary’s duty to “make available” the funds required b subsection (a) may be subject to appropriations, the United States’ obligation for that amount i not.

³² This interpretation is further supported by the rule that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rusello v. United States*, 464 U.S. 16, 23 (1983). As noted above, Congress consistently indicated whenever it was referring to the “required *amount*” of the government’s obligation, but referred in the § 106(b) availability clause only to the “provision of

(2) Comparing the § 106(b) availability clause with the balance of § 106(b). If

possible, statutes are also to be construed to avoid rendering any portion of them mere surplusage. *Dunn v. Commodity Futures Trading Comm’n*, 117 S.Ct. 913, 917 (1997). The first five clauses of subsection (b) (all one sentence) provide that the “*amount of funds*” shall not be reduced by the Secretary except for five specific reasons. § 450j-1(b)(1)-(5). In particular, subsection (b)(2)(A) provides that “[t]he amount of funds required by subsection (a) of this section . . . shall not be reduced by the Secretary in subsequent years except pursuant to . . . a reduction in appropriations from the previous fiscal year for the program or function to be contracted.” It is in this subsection, not the § 106(b) availability clause, that Congress addressed the issue of how the “*amount*” of funding required by subsection (a) should be calculated in light of appropriation limitations, and it carefully limited any reduction only to years where Congress has reduced the IHS appropriation from the preceding year. Again, this plain meaning interpretation harmonizes the § 106(b) availability clause with these precisely formulated constraints on the Secretary’s ability to reduce the amount required by subsection (a).³³

(3) Comparing the § 106(b) availability clause with § 106(c). The government’s

funds” and “mak[ing] funds available,” reflecting an intent that the availability clause not affect the government’s underlying liability for the specified amount. As in *Rusello*, one should “refrain from concluding here that the differing language in the two subsections has the same meaning in each.” 464 U.S. at 23.

³³ A contrary reading would also violate the maxim that the expression of listed exceptions to a general rule excludes implying other exceptions. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (requirement that fraud and mistake be pled with particularity under Rule of Federal Procedure 8(a)(2) excludes other exceptions to the general rule that plaintiff must make only “a short and plain statement of the claim”). When Congress specifically listed in the five numbered clauses of subsection (b) the limited circumstances when the Secretary could make exceptions to the general rule mandating the amount a contractor is to receive, Congress excluded the possibility of additional exceptions for other reasons. *See also* 25 U.S.C. § 450l(c)(model contract § 1(e)(2)) (“no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification” unless that modification results in the “addition of supplemental funds” or “*the reduction of funds pursuant to* [25 U.S.C. § 450j-1(b)(2)]”). By specifically referring to subsection (b)(2) and not the § 106(b) availability clause, this clause reinforces Congress’s intent that the latter does not give the Secretary the unilateral right to reduce funding entitlements.

interpretation of the 1988 and 1994 Amendments also runs counter to subsection (c)(2) of § 450j-1, which (until repealed a few months ago, *see* Pub. L. No. 105-362, § 801(g)) required the Secretary to provide to Congress an annual “accounting of any deficiency of funds needed to provide *required contract support costs* to all contractors for the current fiscal year” (emphasis added). By requiring the Secretary to report “any deficiency” (*i.e.*, when obligations exceed available funds “*needed to provide required contract support costs*”),³⁴ Congress emphasized the mandatory nature of the obligation imposed by subsection (a) and it required the agency to notify Congress of any need to supplement the agency’s budget so as to meet its obligations.³⁵

³⁴ In appropriations jargon, a “deficiency” occurs when an agency has “incurred [obligations] in excess of available funds.” *See* United States General Accounting Office, *A Glossary of the Terms Used in the Federal Budget Process* (3d ed. 1981) (*Glossary*) Exh. 15- at 56; *see also* the Antideficiency Act, 31 U.S.C. § 1341.

³⁵ Government contracts impose on the agency a duty to seek sufficient contract funding. Where the agency fails to seek these funds and a funding shortfall ensues, the courts have refused to allow the United States to escape liability by claiming that its funding duty was subject to the availability of appropriations. *S.A. Healy Co. v. U.S.*, 576 F.2d 299, 304 (Ct.Cl. 1978) (holding that “funds available” clauses were “simply not designed unequivocally to put the contractor on notice that he bears all the risk of loss ensuing from the unavailability of funds for earnings, no matter what the reason therefor”). The court summarized the point this way:

In short, then, we hold that the protective umbrella of the funds available clause, as worded in this contract, does not extend to an exhaustion of funds occasioned by the agency’s decision to request funding grossly inadequate to support the level of [contract payments] approved by the agency for the fiscal year.

S.A. Healy at 307. *See also San Carlos Irr. and Drainage Dist. v. U.S.*, 23 Cl. Ct. 276, 282-83 (1991) (“The United States cannot escape liability under the contract because the BIA did no attempt to obtain appropriations from Congress to repair the spillway gates”).

In this case, IHS failed to seek appropriations sufficient to fund the contractors’ full contract support costs needs, although the agency was fully aware of the chronic shortfall of contract support costs. *See, e.g.*, Indian Health Service, FY 1997 “Justification for Estimates for Appropriations Committees,” SUP-76, Exh. 8 at 6. If Congress in 1996 and 1997 appropriated insufficient funds for contract support costs, there is little wonder given these insufficient requests.

(d) Comparing the § 106(b) availability clause with other ISDA sections.

Reading the § 106(b) availability clause to only limit the Secretary's authority to liquidate obligations is also consistent with the prohibition against the Secretary unilaterally amending a contract (*e.g.*, § 450m-1(b)) and the ISDA's limit on the Secretary's right to withhold payment even where a tribal contractor may have breached an agreement. § 450j-1(l) (Secretary must provide advance notice, technical assistance and a hearing on the record at which the Secretary bears the burden of proof). Under the defendants' interpretation of the § 106(b) availability clause, the Secretary could unilaterally reduce its obligation to tribal contractors who have fully complied with their contracts without any notice or due process at all, and without any requirement that IHS even provide supporting evidence.

The plaintiffs' interpretation of the § 106(b) availability clause also goes hand-in-hand with the provision, likewise added to the ISDA in 1988, authorizing "money damages" in civil actions to enforce the ISDA. 25 U.S.C. § 450m-1(a). *See Shoshone-Bannock I*, 988 F. Supp. at 1315 ("when an appropriation has lapsed or is not sufficient, the appropriate remedy [under the ISDA] will be money damages rather than injunctive relief"). This provision, added specifically to allow contracting tribes to enforce their rights to indirect cost funding, *Ramah Navajo School Bd.*, 87 F.3d at 1344-45 (citing S. Rep. No. 100-274), reinforces that the government's liability for the amount specified in contracts and required by subsection (a) is not limited by the amount of particular appropriations.³⁶

Moreover, unlike the clauses in *S.A. Healy* and *San Carlos* which unmistakably sought to condition liability at some length, the six-word § 106(b) availability clause nowhere even hints at a limitation on the government's liability. Under these circumstances this clause cannot be read to shift to the contractor the full risk of loss occasioned by insufficient appropriations for which the agency itself is to blame.

³⁶ According to the Senate Report, S. Rep. No. 100-274 at 37, Congress added the enforcement provision specifically:

to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. . . . Self-determination contractors' rights under the Act have

(5) Indian canon of statutory construction. Finally, even if ambiguity could somehow be injected into the plain terms of the statute and the § 106(b) availability clause, canons of construction unique to Indian legislation require that courts reject any interpretation seeking to exploit the ambiguity against the tribes, and to deprive the tribes of funds required to carry out their health care programs. *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975). The Tenth Circuit has specifically held that this canon “controls over the more general rule of deference to agency interpretations of ambiguous statutes” when interpreting the contract support cost provisions of the ISDA, so that the canon “constrain[s] the possible number of reasonable ways to read an ambiguity in [the] statute.” *Ramah Navajo Chapter*, 112 F.3d at 1461-62 (quoting *Commonwealth of Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996)). The ISDA and the implementing regulations expressly incorporate this canon.³⁷

In summary, when read in light of the ISDA as a whole, the § 106(b) availability clause addresses only the Secretary’s ministerial duty to disburse funds. It does not excuse the obligation to comply with the mandates

been systematically violated particularly in the area of funding indirect costs.

³⁷ 25 U.S.C. § 450I(c), model contract § 1(a)(2) (“Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer *the funding* . . . from the Federal Government to the Contractor”) (emphasis added); *id.* § 1(d)(1) & (2) (reaffirming trust responsibility and providing that “Secretary shall act in good faith in cooperating” with Tribes); Title III § 303(a)(7), (e) & (f), *reprinted at* 25 U.S.C. § 450f note (affirming trust responsibility and directing Secretaries to “interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title” and “the inclusion of activities, programs, services, and functions in [such] agreements”); 25 U.S.C. § 450n(2) (affirming “trust responsibility of the United States with respect to the Indian people”); 25 C.F.R. § 900.3(b)(11) (binding Secretary to apply the canon in construing regulations implementing the ISDA).

of subsection (a) to pay the precise “amounts” specified there and in the relevant contract. Thus, the availability clause limits IHS’s authority to spend, but does not limit its authority to incur binding obligations for fixed amounts.

b. The legislative history of the ISDA firmly supports the interpretation of the § 106(b) availability clause advanced here.

The § 106(b) availability clause, like the rest of § 106, was added to the ISDA in the 1988 amendments. Pub. L. No. 100-472 § 205. That legislative history, by repeatedly affirming the need for tribal contractors to receive full funding of contract support costs and rejecting the Secretary's authority to reduce that funding, confirms the plain meaning interpretation advanced here, and squarely contradicts an interpretation of the availability clause as a broad loophole permitting IHS unfettered discretion to unilaterally evade its liability. Thus, to the extent that the text of the statute is found to be ambiguous in any respect, the legislative history removes that ambiguity.

The § 106(b) availability clause was only included in the 1988 amendments at the last moment, as part of a rewritten version of the bill previously passed by the Senate. Earlier versions and the accompanying legislative history are revealing in the complete lack of any provision granting the Secretary the authority she now claims. For instance, in an early version of H.R. 1223, 100th Cong., 1st Sess. (1987) (amending former § 106(h) of the ISDA), the relevant section provided:

(h)(1) The amount of funds provided under the terms of contracts entered into pursuant to this Act shall be no less than the appropriate Secretary would have otherwise provided for his operation of the programs or portion thereof for the period covered by the contract.

(2) To the amount available under subsection (h)(1) of this section shall be added the negotiated contract support costs.

....

(5) Contract support costs shall be awarded for all programs for which a tribal organization has contracted

(6) Except for general assistance grants, once contract and grant obligations are negotiated, the contract or grant amount may be decreased only with the consent of the contractor or grantee or to reflect a reduction in

congressional appropriation from the previous fiscal year as reflected in the appropriation line item from which the contract or grant funds are derived.

H.R. Rep. No.100-393 at 14 (1987). The report accompanying this bill stated that it “attempts to . . . amend[] the Self-Determination Act so as to *guarantee the tribes an adequate level of funding for contract support costs,*” *id.* at 4 (emphasis added), and the commentary that became § 106 notes that “the Committee believes that the Federal agencies *must pay contractors for the administrative costs they incur in operating all programs contracted pursuant to [the ISDA].*” *Id.* at 7 (emphasis added).

The Senate’s version of the bill (S. 1703, 100th Cong. 1st Sess. (1987)) expanded these measures further to create a new § 106. Again, the bill included nothing giving the Secretary the broad authority she now claims. S. Rep. No. 100-274 at 30-34. Rather (and as already noted earlier) the committee report accompanying this bill--the definitive report for the 1988 amendments--repeatedly addresses the need for *full funding* of contract support costs, terming IHS’s funding failures “[p]erhaps the single most serious problem with implementation of the Indian self-determination policy,” and adding 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 8, 13.³⁸ The report also

³⁸ At a hearing on S. 1703, Senator Inouye reinforced this point

A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, “Sorry, boys, we don’t have the cash, so we’re going to stop right here” after you’ve put up all the money. At the same time, you don’t have the resources to sue the Government. Obviously, equity is not on your side. We’re going to change that also.

To Amend the Indian Self-Determination and Education Assistance Act: Hearing on S. 1703 Before the Senate Select Committee on Indian Affairs, 100th Cong., 1st Sess., 55 (Sept. 21, 1987).

addressed the cause of appropriations shortfalls for contract support, stating that “[f]or several years the Bureau of Indian Affairs and the Indian Health Service have failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts. Consequently, *tribes have been forced to request supplemental appropriations directly from Congress to make up the shortfall.*” *Id.* at 9 (emphasis added). Current § 106 responds to this problem. By placing the obligation to fully fund indirect costs squarely on the agencies, Congress made sure that they would properly inform it of the funding necessary to meet the government’s contractual commitments.³⁹

In commenting specifically on what became § 450j-1(b)(2)(A), the Committee noted this “would prevent the Secretary from reducing funds for a self-determination contract, except in response to a reduction in appropriations enacted by the Congress.” *Id.* at 31. Nowhere does the legislative history suggest any intent by Congress to grant the Secretary authority to unilaterally reduce the amount of contract support costs owed to a tribal contractor. Any such provision would be puzzling, indeed, given the drafters’ clear concerns, evident throughout the report, that tribal contractors must receive their full funding and that the Secretary’s discretion to reduce funding must be severely limited.⁴⁰

³⁹ Significantly, one of the goals of S. 1703 was to “[p]rovide a framework for enabling the Congress to determine the amount of appropriations needed for tribal indirect costs.” S. Rep. No. 100-274 at 14.

⁴⁰ The legislative history also explains Congress’s choice of the term “contract” in the ISDA (S. Rep. No. 100-274 at 19), emphasizing that Congress well understood the agency’s potential liability under the statute:

The Committee considered deleting the term “contract” and using another term such as “self-determination grant” or “intergovernmental agreement.” Ultimately, however, the Committee determined that the use of the term “contract” is important *to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party.*

After the addition of the § 106(b) availability clause in the final House revision, House Manager Rep. Udall explained that the amendment was “mostly a technical rewrite” and that he would note only the “more important changes.” 134 Cong. Rec. H7366-04, 1988 WL 175429, pp. 35-37 (Sept. 9, 1988). He stated that the “new [§ 106(a)] language is identical” to a provision in the original House version. *Id.* (As discussed above, that version, like the Senate version, was aimed at amending the Act “so as to *guarantee the tribes an adequate level of funding for contract support costs.*” H.R. Rep. No.100-393 at 4 (1987) (emphasis added).) Rep. Udall explained that the new language meant that contract support costs “shall be added” to the required Secretarial amount. 1988 WL 175429, pp. 35-37.

Rep. Udall never even mentioned the House addition of the § 106(b) availability clause. *Id.* This silence, too, cuts against an interpretation of the availability clause as a sweeping limit on the government’s liability. Certainly one would expect that such an “important change” (as the government would have it) would have received at least *some* mention somewhere in the legislative history.⁴¹ In truth, however, the § 106(b) availability clause is much more limited: Rather than providing a loophole to all the Act’s mandates, the availability clause merely addresses the narrow issue of the Secretary’s administrative duty to disburse agency funds from appropriations acts.

In short, if Congress had intended to retain the power to limit the amount of contract support costs to be obligated, the logical approach would have been simply to remove contract support costs altogether from the amount specified in § 106(a), and to provide for the solely through annual appropriations.⁴² IHS contends that Congress instead chose a devious and

⁴¹ See *Train v. City of New York*, 420 U.S. 35, 45-46 (1975) (“We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation”).

⁴² Indeed, this is one of the very alternatives recently discussed (but not recommended) by the General Accounting Office as a means of *amending* the ISDA to limit contracting support cost obligations. GAO Report at 57-58, Exh. 2 at 58-59.

confusing approach, first promising full funding through a half dozen explicit, mandatory provisions, and then undercutting that promise through one unnumbered sentence that neither addresses the required amount of funding nor receives any mention in the legislative history. This is not credible. The plain text of the statute, the legislative history, and the applicable case law dealing with government contracting and appropriations unequivocally support the conclusion that the amounts specified in 25 U.S.C. § 450j-1(a) are legally enforceable obligations of the United States, regardless of the amount subsequently appropriated by Congress.

C. By Requiring the Secretary to Enter into Contracts in Advance of Appropriations, the ISDA Confers “Contract Authority” to Create Binding Obligations of the United States Regardless of Subsequent Appropriations.

The mandatory funding provisions of § 450j-1(a), by providing the Secretary with “legislative authorization . . . to create obligations in advance of an appropriation,” create what is referred to in the jargon of federal appropriations law as “contract authority.”⁴³ *National Ass’n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977); see also I U.S. General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law* 2-4 (1991). As the Supreme Court has explained, a statute granting “contract authority” to an agency

establishe[s] a funding method differing in important respects from the normal system of program approval and authorization of appropriation followed by separate annual appropriation acts. Under that approach, it is not until the actual appropriation that the Government funds can be deemed firmly committed. Under the contract-authority scheme . . . before us now, there are authorizations for future appropriations but also initial and

⁴³ As explained by the Comptroller General, “contract authority” provides an exception to the general rule, codified in the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B), that “prohibits Government officers and employees from involving the Government in any contract or other obligation, for payment of money . . . in advance of appropriations” unless the contract is “otherwise authorized by law.” B-211190, 1983 WL 207412 *3, Exh. 15-C at 13.

continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of authorization. The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations.

Train, supra, 420 U.S. at 39 n.2.

Although obligations incurred under contract authority are generally funded by subsequent appropriations, it is hornbook government contracting law that a failure by Congress

to appropriate sufficient funds to meet those obligations does not limit the government's liability to pay the specified amount of the obligation. *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) (“[i]t has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute”) (citations omitted); *see also Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) (“[w]e know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation”); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (holding that “insufficiency” of an appropriation “does not pay the Government’s debts nor cancel its obligations, nor defeat the rights of other parties”).

One example addressed by the Comptroller General considered the potential liability of the United States under the Federal Boat Safety Act, a statute similar in many significant ways to the ISDA. *To the Chairman, House Committee on Merchant Marine and Fisheries*, No. B-211190, 1983 WL 207412 (April 5, 1983), Exh. 15-C at 11. Congress enacted the act to encourage state participation in the administration of boating safety programs, requiring the Secretary of Transportation to enter automatically into a contractual agreement to provide an amount to a state that met certain statutory requirements with a specified amount of funding. *Id.* at *2-4, Exh. 15-C at 12-15. After considering the act, the Comptroller General opined that “if the amounts appropriated to liquidate obligations are not sufficient to cover obligations to the States in any

fiscal year, the United States, through the Coast Guard, would probably be found liable by a Federal court to the States to whom obligations have been made”⁴⁴ *Id.* at *1.

Similarly here, the ISDA authorizes—indeed, requires—IHS to turn over to willing tribes the administration of federal programs designed to benefit Indians. To further the goal of self-determination, Congress tightly circumscribed the Secretary’s discretion to decline to contract or to determine the terms of the contract, including the amount of contract support cost funding. Thus, the statute mandates the amount of funding for contract support costs, like the amount of funding for direct costs, and specifically requires the Secretary to bind the United States to that amount through contract.

Where an agency like IHS has contract authority, the United States is liable for the contracted obligation notwithstanding the presence of an “availability of funds” clause, just as the United States was found liable in *New York Airways*. There the court considered a statute under which the Civil Aeronautics Board set a monthly subsidy the Board would pay a helicopter company for transporting mail. The court considered “whether the particular wording of the Ac

⁴⁴ Statutes requiring or allowing agencies to enter into such obligations in advance of appropriations—and thus conferring “contract authority”—are far from rare. *See Train*, 420 U.S. at 39 n.2; *New York Airways*, 369 F.2d at 748-52 (statute authorizing payments to companies for carrying the mail obligated government in absence of liquidating appropriation); *Matter of Department of Transportation—Establishment of a Bus Testing Facility*, No. B-228732, Feb. 18, 1988, 1988 WL 227204 *3, Exh. 15-C at 18-19 (statute authorized contractual obligation for project regardless of appropriations); *Matter of Statutory Authority of Interstate Commerce Commission to Direct Rail Transportation*, B-196132, Oct. 11, 1979, 1979 WL 11970, Exh. 15-C at 3 (statute authorized ICC to incur obligations in absence of appropriations); *To the Dir. Admin. Office of the United States Courts*, B-156932, Aug. 17, 1965, 1965 WL 2325, Exh. 15-C at 1 (statute required court system to incur obligations regardless of appropriation); *Matter of Great River Road—Contract Authority*, B-164497(3), June 6, 1979, 1979 WL 12470, Exh. 15-C at 7 (statute provided “contract authority” to DOT for certain road construction). *See generally* GAO, II *Principles of Federal Appropriations Law* at 6-50 through 6-53, Exh. 15-B at 5 through 8, and cases cited therein (discussing “contract authority” in detail).

empower[ed] the Board to obligate the United States for the payment of an agreed subsidy in the absence or deficiency of a congressional appropriation,” 369 F.2d at 744, since the relevant portion of the statute provided that CAB payments would be made “*out of appropriations made to the Board for that purpose.*” *Id.* at 745 (citing former 49 U.S.C. § 1376(c)) (emphasis added). The key issue, as framed by the court, was whether this phrase “allows the Board to pay subsidies only to the extent that Congress appropriates money to it for that specific purpose,” or rather “merely defines the ministerial responsibility” of the Board “for disbursement of . . . subsidy payments to the carriers.” *Id.*

After considering the statute, the legislative history, and the views of the Comptroller General, the court ruled that the italicized phrase did not limit the amount of the government’s liability, but only the Board’s authority to liquidate those obligations, where Congress failed to appropriate enough funds for it to do so. *Id.* at 748. The court ruled that the authority of the Board to fix the subsidy rates was not “circumscribed by the availability of annual appropriations,” nor did Congress intend “to deposit in [itself] the ultimate authority to determine rates through the annual appropriation process.”⁴⁵ *Id.*

⁴⁵ To the same effect is the Comptroller General’s opinion regarding the Federal Safe Boating Act. B-211190, 1983 WL 207412 *2, Exh. 15-C at 12-13 (citing Pub. L. No. 97-424 § 421(a)) (providing that “the Secretary is authorized to expend [the specified amount of funds], *subject to such amounts as are provided in appropriations Acts for liquidation of contract authority*”) (emphasis added). The Comptroller General found that this clause “only restrict[ed] the amounts that can be drawn from the trust fund to liquidate, i.e., to pay, the obligations previously incurred to amounts subsequently appropriated by the Congress,” and did not restrict the amount of the obligation itself *id.* at *3, or the government’s liability *id.* at *4.

The same reasoning was applied in *District of Columbia v. Potomac Electric Power Co.*, 402 A.2d 430 (D.C. App. 1979). Holding that appropriations measures enacted to limit payments for electricity by the District of Columbia to a specified amount did not limit the District’s obligation to pay the full amount due under properly established rates. *Id.* at 434, 439-

The ISDA contains the same type of provision, the § 106(b) availability clause. That availability clause by its plain terms limits only the Secretary's ministerial duty to disburse funds, but not the United States liability for the amounts specified by the statute and the contracts.

VI. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action should be granted.

Respectfully submitted this 23rd day of July 1999.

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440 (discussing and relying on *New York Airways*). Rather, as the court put it, the measure simply "mean[s] what it says:" that "the disbursing officer for the District may not use any of the congressionally appropriated sums to pay for street lighting at rates in excess of two cents per KWH." *Id.* at 436. The power company could thus recover against the District for the full amount due under the established rates despite the appropriations limit.