

No. 01-7106

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEROKEE NATION and SHOSHONE-PAIUTE
TRIBES OF THE DUCK VALLEY RESERVATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON,
Secretary of the United States Department of Health and
Human Services, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Oklahoma

The Honorable Frank J. Seay, District Judge
No. 99-092-S CIV

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The government's brief focuses almost exclusively on a side issue – what the outcome should be had appropriations not been available to fully pay the Tribes' contracts (*e.g.*, Gov't Br. 2-4, 21-22). In doing so, it skates past the virtually unopposed proposition that as a matter of law appropriations were legally available all along. This misdirection aside, it is clear the government does not seriously challenge the proposition that in both fiscal years and as to both categories of contract support costs, appropriations were legally "available" to fully pay the amounts due under the Tribes' Indian Self-Determination Act contracts. There is therefore no occasion to even consider (much less decide) what the outcome here would be were it otherwise.

This case is far more straightforward than the government's brief suggests. The Tribes had contracts. Those contracts required the Secretary to pay if appropriations were legally available to do so. Appropriations were legally available at the relevant time. Still the Secretary did not pay. In time he spent his money in other ways. Since the Secretary failed to pay, the Tribes are entitled to damages for breach of contract.

The Tribes' contracts were not subject to the Secretary's discretionary spending decisions. The only stated condition precedent to payment from the

Secretary was the “availability of appropriations,” and that condition was met.

Under the plain terms of their contracts, the Tribes’ right to full payments from the Secretary vested, and they were therefore entitled to their CSCs.

The Secretary’s attempt to de-vest the Tribes’ contract rights with its “other tribes” argument fails. The Secretary agrees that payment could be withheld only if paying the Tribes would have reduced funds to ongoing programs serving some other tribe. But the Secretary has not shown, and cannot show, that this was the situation at the relevant time, because the Secretary had substantial increases in each of the relevant years; thus, paying the Tribes their CSCs could not have possibly reduced the Secretary’s funds needed to continue ongoing programs serving any other tribe. (Moreover, substantial portions of the Secretary’s funds did not finance other tribal programs at all.)

The Secretary’s attempt to de-vest the Tribes’ contract rights by citing an Act of Congress passed several years after those contract rights vested similarly fails. As the Supreme Court has cautioned, Congress cannot invoke its sovereign power in a contract setting to do that which a private individual could not do. Just as an individual cannot alter another’s vested contract rights by an after-the-fact unilateral declaration, so too cannot Congress.

The district court’s decision, and the government’s attempted defense of that decision, are fatally flawed. Those flaws, combined with the government’s concessions by silence or admission, compel reversal.

STANDARD OF REVIEW & RULES OF STATUTORY CONSTRUCTION

I. STANDARD OF REVIEW

The government does not disagree that it carries the burden of proof to establish that its failure to pay the Tribes was excused by either § 450j-1(b) or § 314 (Tribes’ Br. 20), and that summary judgment for the Tribes is accordingly “‘manda[tory]’ if the government ‘fails to make a showing sufficient to establish the existence of an element essential to [its] case.’” *Id.*, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Nor does the government challenge the district court’s conclusion that review here is *de novo* and not under the Administrative Procedures Act. Aplt. Att. 13-21.¹

¹ IHS also claims its interpretations of the ISDA are entitled to deference. Gov’t Br. 26, citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Not so. “*Chevron*” deference only applies to a regulation, 467 U.S. at 844, and it presupposes a specific congressional delegation of authority to the agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”). No such delegation occurred here. Tribes’ Br. 6-7.

II. RULES OF STATUTORY CONSTRUCTION

The government simply ignores the ISDA's controlling rule of statutory construction: that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor."

25 U.S.C. § 450l(c)(sec. 1(a)(2)). Tribes' Br. 21.

The government acknowledges the "Indian canon" of statutory construction, a canon which similarly trumps the "plain meaning" rule.² But it nonetheless insists that "§ 450j-1 (b) is clear and unambiguous,"³ and that § 314 has a "plain," "unmistakeabl[e]" and "unambiguous" meaning.⁴ It takes these positions only by disregarding the contrary interpretations these provisions have received from other tribunals.⁵

² *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (*en banc*). See also *Shoshone IV*, 2002 WL 148220, *5 (9th Cir. 2002) (amending opinion to remove statement that the Indian canon only applies to treaties).

³ Gov't Br. 26-27.

⁴ *Id.* at 44, 47.

⁵ Tribes' Br. 24 n.43, 53; *Appeals of Cherokee I*, slip op. 15-21 (Aplt. Att. 270-276). Although the government indirectly suggests that the term of art "shall remain available" in the two Appropriations Acts might be ambiguous (Gov't Br. 51 n.24; *but see* Part I-B, *infra*), the government neglects using the Indian canon to resolve the claimed ambiguity.

ARGUMENT

I. THE GOVERNMENT FAILS TO ESTABLISH THAT THE SECRETARY'S PERFORMANCE UNDER THE CONTRACTS WAS EXCUSED

The government agrees that in FY1996 and FY1997 the Secretary failed to fully pay the Tribes their contract support costs. Gov't Br. 13-17. The government then insists over and over that the Secretary's duty to pay was subject to the availability of appropriations, while begging the core question: whether, in fact, IHS's full lump-sum appropriation was legally "available" each year to fully pay the Tribes their "ongoing" and "new" CSCs.⁶ The answer to that core issue is fatal to the government's defense.

A. The Government Does Not Dispute that Sufficient Appropriations were Legally Available for the Secretary to Pay the Tribes' Contract Support Costs Associated with the "Ongoing" Portions of Their Contracts

The Tribes in their opening brief established that: (1) the phrase "availability of appropriations" in § 450j-1(b) is a term of art in appropriations law; (2) under that law an agency's lump-sum appropriation is "legally available" to pay all mandatory obligations otherwise authorized by law to be paid; (3) IHS

⁶ The government also neglects mentioning this core issue in its Statement of the Issues. Gov't Br. 2.

was authorized to use its lump-sum appropriation to pay contract amounts due under the ISDA; (4) Congress can limit the availability of a lump-sum appropriation to pay certain sums by inserting a statutory earmark that caps the amount the agency may spend; but that (5) in the FY1996 and FY1997 IHS appropriation Congress did not do so as to “ongoing” CSCs. Tribes’ Br. 25-27, 30-31.

On these critical points the government says nothing. Nowhere – not even in the section of its brief devoted to “ongoing” CSCs – does the government argue that Congress in either Appropriations Act earmarked the maximum amount IHS could lawfully spend on such CSCs.⁷ Rightly so, for both Acts are silent.

⁷ Gov’t Br. 33, 36-40. Neither did the district court. Aplt. Att. 25. Instead, the government relies exclusively on the “reduction” clause, discussed *infra* Part I-C.

See also Gov’t Br. 7 (making the legally insignificant observation that in the FY1996 Act “the House Committee on Appropriations recommended” certain amounts be spent for this purpose); *but see* Tribes’ Br. 30-31 (committee recommendations “do not establish any legal requirements on’ the agency,” quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). *See also* Gov’t Br. 8 (mis-using the term “earmark” by stating that “ongoing” CSCs were “earmarked in the appropriations committee report”); *id.* at 39 (notwithstanding *Lincoln*’s categorical rejection of appropriation committee language, and the fact that a committee is not “Congress” and so cannot “earmark” anything, insisting that “the legislative history [of the two Appropriations Acts] demonstrates that Congress believed that only the amounts earmarked in appropriation committee reports should be made available for [ongoing CSC”) (emph. added).

Thus the parties agree that nothing in either Act limited the availability of “ongoing” CSCs to pay the two Tribes in full.⁸

The government sidesteps the issue by arguing that regardless of the legal availability of the Secretary’s appropriations to pay CSCs, the Secretary still retained some “discretion” not to fully pay.⁹ But that proposition is countered by the only case the government cites in support, *Lincoln v. Vigil*, 508 U.S. 182

⁸ One of the government’s more stunning mis-statements is that the statutory provision at issue in *Oglala* had only “slightly different wording.” Gov’t Br. 29. The *Oglala* statute said “not to exceed” a certain amount was available for ongoing CSCs; the language here says nothing at all about ongoing CSCs. Especially given that the “not to exceed” phrase is a term of art for a statutory cap, only a most creative agency can find these diametrically opposed approaches only “slightly different.” *See also infra* 9 n.14.

⁹ Gov’t Br. 8 (“IHS’[s] discretion”), 33 (“discretion”), 35 (“Secretary decided to follow Congress’[s] recommendation in the committee reports as to how much Congress believed IHS should spend on new CSC”). *But see* Gov’t Br. 39 n.18 (conceding that in the ISDA “Congress sought to restrict the Secretary’s discretion when Congress provided sufficient funds”). The government can only point to the 1975 provisions of § 450j(b) to support its claimed “discretion.” Gov’t Br. 8-9. But that provision only concerns the timing of contract payments, not their amount. Moreover, it was implicitly repealed by the later-enacted mandatory payment provisions of § 450l(c)(sec. 1(b)(6)).

The Secretary’s related claim that IHS’s internal CSC circulars are binding is another error. Gov’t Br. 9 n.8. First, IHS’s 1996 circular expressly states it is not binding on anyone. (Aplt. App. 208.) Second, the “internal agency procedures” referenced in § 450k(a)(1) were jointly adopted by the IHS and BIA 3 years later on July 28, 1999 (Aplt. Att. 339), and they have nothing to do with IHS’s CSC circulars. The *Shoshone IV* panel got these facts wrong, too. 2002 WL 148220, *2 n.8. Third, the one contract that mentions a circular conditions it “To the extent not inconsistent with section 106(a) and (b) of the [ISDA].” Aplt. App. 341. The government omits this. Gov’t Br. 16.

(1993). The Supreme Court there squarely held that when an authorizing statute mandates that an agency spend money in a particular way, it “circumscribe[s]” (*id.* at 193) the agency’s discretion to do otherwise with its lump-sum appropriation unless the appropriation itself “statutory restrict[s]” its expenditure (*id.* at 192).¹⁰

In sum, the government fails to carry its burden on its first defense.¹¹

B. The Government Does Not Dispute that Sufficient Appropriations were Legally Available for the Secretary to Pay the Tribes’ “Initial or Expanded” Contract Support Costs

Here, too, the government does not raise the “availability” clause as a barrier to payment of “initial or expanded” CSCs.¹² Instead, it again relies exclusively on the reduction clause. Gov’t Br. 33-35. For good reason, given the

¹⁰ In addition to the district court in *Shoshone I*, this is the precise ruling of the Interior Board of Contract Appeals in three decisions. Tribes’ Br. 24 n.43. (In mis-citing the *Alamo* case (Gov’t Br. 31 n.14), the government misses that the government abandoned its appeal from the IBCA’s ruling on this point. Tribes’ Br. 24 n.43.)

As for the government’s characterization of IBCA rulings as having “no precedential value” (Gov’t Br. 32 n.14), see *West v. All State Boiler*, 146 F.3d 1368, 1371 (Fed. Cir. 1998) (giving “careful consideration to the Board’s legal conclusions in recognition of its ‘considerable experience in construing government contracts’”).

¹¹ Outside its Argument, the government twice asserts that the ISDA actually conditions the payment of CSCs on appropriations “appropriated for a particular purpose” or “made available for that purpose.” Gov’t Br. 4, 22 (emph. added). If by this the government means that paying CSCs requires a special statutory earmark, that is not what § 450j-1(b) says. Nor is it what IHS ever did, since it paid CSCs in FY1996 and FY1997 without any statutory earmark at all.

¹² The government prefers the term “new.” *E.g.*, Gov’t Br. 33.

government's contrary concessions in the district court and in the *Shoshone IV* litigation.¹³

The government thus has no answer to the Tribes' discussion of the term of art "shall remain available" (used to describe the ISD Fund), as distinguished from the term of art "not to exceed" (used to describe CSCs payable by the Bureau of Indian Affairs elsewhere in the same two Appropriations Acts).

The government's election not to defend the *Shoshone IV* panel's erroneous (and unbriefed) conclusion on the meaning of the term "shall remain available" speaks volumes.¹⁴

¹³ Tribes' Br. 34 n.57. The government time and again conceded that the "shall remain available" phrase did not cap the legal availability of the entire lump-sum appropriation to pay "initial" contract support costs. (Instead, the government insisted that while the Secretary could and did exceed the \$7.5 million amount, *Shoshone I*, 988 F.Supp. at 1332, the Secretary also had discretion not to pay the plaintiff Tribe. *Supra*, 7 n.9.) The parties therefore never briefed whether the government was correct to concede the point, nor whether "*Oglala*" would control had appropriations not been legally available. The *Shoshone IV* panel plainly surprised the parties by deciding a question they neither briefed nor argued, contrary to this Circuit's practice. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1214 n.15 (10th Cir. 2001).

¹⁴ Putting aside that "[t]he decisions of the Ninth Circuit are not binding on this circuit," *FDIC v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992), the *Shoshone IV* panel plainly errs when it "'den[ies] that [the words 'shall remain available'] when used in an appropriation bill are words of art or have a settled meaning.'" 2002 WL 148220, *4. As pointed out in the Tribes' Brief at 33-37, they certainly are: when Congress wanted to convey a "cap" meaning, it said "not to exceed;" when it wanted to speak to how long an appropriation would last it said "shall remain available;" and when it wanted to convey both concepts, it included both terms of art. *See also* Tribes' Br. 35-36 (discussing controlling Comptroller General opinions on the term of art "shall remain available").

The government is reduced to arguing that had it followed the law, it might have faced an angry appropriations committee, Gov't Br. 35 n.15, hardly a legal justification for violating the ISDA and breaching the Tribes' contracts.¹⁵

Thus, the government fails to carry its burden on its second defense.

C. The Government Fails to Establish that The “Reduction Clause” Excused the Secretary’s Obligation to Perform Under the Contracts

The Secretary can only invoke the “reduction” clause if he can show that at the time payment to these two Tribes was due – which was at the beginning

The Comptroller General’s decisions are binding on the Executive Branch and highly persuasive with the courts. 31 U.S.C. § 3526(d); *Ass’n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001).

Contrary to the *Shoshone IV* decision, a court should “refrain from concluding here that the differing language in the two subsections” – one using ‘not to exceed,’ the other not – nonetheless “has the same meaning in each.” *Russello v. United States*, 464 U.S. 16, 23 (1983). Rather, “when the same words are used in different sections of the law” – here, ‘shall remain available’ – “they will be given the same meaning.” *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987). And consistent with a “cardinal principle of statutory construction,” *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001), a court “must avoid, whenever possible, a statutory interpretation that would ‘render superfluous other provisions in the same enactment’” (namely the phrase ‘not to exceed,’ particularly given its use to describe CSCs in the BIA portion of the same Appropriations Acts). *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) (*en banc*).

¹⁵ In its Statement of the Case the government suggests there was a “limited appropriation” for “new” CSC payments because IHS elected to follow “Congress’[s]” – actually, a committee’s – “recommendation.” Gov’t Br. 11. The point is properly abandoned in its Argument.

of each year – he determined not to pay the Tribes because doing so would (in the words of §450j-1(b)) “reduce funding for programs, projects, or activities serving a[nother] tribe.” Tribes’ Br. 38-41. (Here, the government simply errs in denying that all payments under the Tribes’ contracts were due at the beginning of each fiscal year (Gov’t Br. 37-38); they were.¹⁶) The *Shoshone I* court put it well: the Secretary “certainly [remains] required to fund CSC with available appropriated funds before undertaking new discretionary projects or initiatives or permitting funds to lapse to the Treasury.”¹⁷ The IBCA agrees, noting the Secretary’s “duty [under the reduction clause] to fully fund the mandatory CSC contracts first.”¹⁸

¹⁶ See Tribes’ Br. 40 n.63 (discussing the timing of the payment due the Tribes, and thus the timing of the Secretary’s determination under the “reduction” clause); *infra* 17 n.24. See also Aplt. App. 302 (Shoshone-Paiute Compact); 340 (Shoshone-Paiute FY1996 Annual Funding Agreement); 372 (Shoshone FY1997 AFA); 435 (Cherokee FY1996 AFA) (all requiring a single lump-sum payment within a few days after IHS receives its annual apportionment from OMB). See also § 450l(c)(sec. 1(b)(6)) (model contract) & § 458aaa-7(a)(ISDA Title V compacts and funding agreements) (both requiring payments within ten days of apportionment). The government is not consistent on this timing issue, for elsewhere it says all payment decisions are made “at the beginning of the year.” Gov’t Br. 40.

¹⁷ 988 F.Supp. at 1332. Contrary to the government’s misreading (Gov’t Br. 36 n.16), the *Shoshone IV* panel did not decide the “reduction” clause issue (although it did note that IHS “did not submit any evidence” on the matter), because the court disposed of the case – albeit wrongly we submit – under the “availability” clause. 2002 WL 148220, *5.

¹⁸ *Appeals of Cherokee II*, slip op. 4 (Aplt. Att. 281).

In response, the government invents a self-serving new formula: if the Secretary's appropriations "would not cover all program needs, [he] had discretion to limit the amount of new CSC expenditures." Gov't Br. 33 (emph. added). Of course, since government appropriations are never sufficient to cover "all program needs," the government's new formula would allow the Secretary to always elect to pay nothing to the Tribes with which he has contracted.¹⁹

The glaring flaw with this formula is that it ignores the actual statutory language. The "reduction clause" speaks to "reduc[ing]" existing programs, not 'covering all program needs' or some other vague standard that would vest the Secretary with authority to increase discretionary programs at the expense of tribal contractors. The government's construction of the reduction clause is certainly not one that "liberally construe[s] [the reduction clause] for the benefit of the Contractor," § 450l(c)(sec. 1(a)(2)), and it defies Congress's studied intent to deny the Secretary the very discretion he now asserts. Tribes' Br. 5-7.

The government's remarkable statement that "Congress has not restricted IHS' allocation of its lump-sum appropriation by requiring full immediate funding of CSC claims" (Gov't Br. 34) is directly contrary to the ISDA

¹⁹ See *Oxy*, 268 F.3d at 1006 ("We are confident Congress did not intend [the provision at issue] to be the means to [an] irrational end.").

which in §§ 450j-1(a), (b) and (g) commands the Secretary to pay ISDA contracts in “full” when appropriations are legally available to do so, and which in § 450j-1(b) only provides an ‘out’ if doing so would cause a reduction in ongoing programs – not (as the government would have it) depending on “whether [the Secretary believes] funds are best spent on one program or another.” *Id.*

In short, the ISDA does not authorize the Secretary to deny full funding due under ISDA contracts while he elects to start new initiatives or programs, increase existing programs, fund IHS staff development or tend to any other “needs” the Secretary considers more worthy.²⁰ Congress, wisely, did not leave it to the Secretary’s discretion to decide when there are “sufficient funds” (Gov’t Br. 3-4) to pay amounts due Indian tribes under ISDA contracts.²¹

²⁰ See *Appeals of Cherokee II*, slip op. 4 (Aplt. Att. 281).

²¹ The government’s effort to explain why the “reduction” clause is not a *post hoc* rationalization only makes the Tribes’ point. Yes, “IHS did its budget execution for all categories, not just CSC, at the beginning of the year.” Gov’t Br. 40. But according to the Record it never at that time or since assessed how much of its budget could be devoted to paying CSC contract obligations without reducing programs serving other tribes. To say that paying the Tribes additional CSC would have reduced, not ongoing programs serving other tribes, but the total amount allocated “at the beginning of the year,” is a meaningless tautology.

Oddly enough, the government actually makes the Tribes' case on this point, explaining:

IHS is thus required to use its lump-sum appropriation to: (1) continue funding programs for non-contracting tribes at the same level; (2) fund contracting tribes no less than the amount the Secretary would have spent to provide the program, including administrative costs; and (3) add funds for costs over and above these program costs that, by definition, were not previously incurred by the Secretary.

Id. at 35 (emph. added). Had the Secretary hewed to this formulation, the Tribes would have been fully paid. Step (1) means maintaining existing funding for all tribes under § 450j-1(b)'s "reduction" clause. Step (2) means paying the "Secretarial amount" due under all ISDA contracts under § 450j-1(a)(1).

And Step (3) means paying all CSCs due under § 450j-1(a)(2). Here, the Secretary had appropriations legally available to him to do so, particularly since IHS's appropriation was substantially increased with new money each of the two years at issue. Tribes' Br. 41-42. Even with those conclusive increases aside, the Secretary's proof below never established the "reduction" clause defense (*supra*, 13 n.21), and only supported the district court's circular conclusion that by

eventually spending its appropriation on other things, IHS demonstrated it had no money left (Tribe's Br. 31-32, 42 & n.67).²²

Thus, the government fails to carry its burden on its third defense.

II. THE GOVERNMENT FAILS TO ESTABLISH THAT SECTION 314 WIPE OUT THE GOVERNMENT'S LIABILITY FOR UNPAID CONTRACT SUPPORT COSTS

A. If Construed Retroactively, Section 314 is a Breach of Statutory and Contractual Rights Because it Repudiates Vested Rights

The government's position on § 314 largely depends on one of two equally faulty propositions: that (1) in FY1996 and FY1997 appropriations to fully pay the Tribes' CSCs were not legally available, or that (2) in FY1996 and FY1997 it was unclear whether such appropriations were legally available. Under either proposition, the government submits, Congress in 1999 then confirmed or clarified its earlier intent.

But as noted earlier, the government does not dispute that both propositions are incorrect. Appropriations were available. Nothing limited the

²² Even that conclusion is dubious, at best. *Id.* at 14 n.27; 42 n.68. Notwithstanding the government's objection, Gov't Br. 48 n.21, the Court may take judicial notice of the President's Annual Budget Requests to Congress. *See* Fed.R.Evid. 201(d), (f); *Pueblo of Sandia v. United States*, 50 F.3d 856, 861-62 n.6 (10th Cir. 1995) (discussing judicial notice of government reports and publications). The President's Budget indicates some of the "obligations" IHS entered into were never actually liquidated, and instead were subsequently deobligated. *See also* Tribes' Br. 44 (explaining district court's error in denying discovery under Rule 56(f)).

legal availability of the 1996 and 1997 IHS appropriations to fully pay ongoing and initial CSCs because (1) as to “ongoing” CSCs, the two lump-sum Appropriations Acts were silent, and (2) as to “initial” CSCs, the two Appropriations Acts set up special accounts permitting limited expenditures after each fiscal year closed, but never capping appropriations to pay “initial” CSCs during the fiscal year. Thus, neither proposition supporting the government’s reliance on § 314 can be sustained.²³

Since at the relevant times appropriations were legally available to fully pay the Tribes’ CSCs in both years, the availability clause was never triggered, and the Tribes’ contractual and statutory rights – to the extent

²³ On the one hand, the government appears to endorse the *Shoshone IV* panel’s conclusion that § 314 clarified an ambiguity that existed in the original two Appropriations Acts as to “initial” CSCs (though not as to “ongoing” CSCs). Gov’t Br. 51 n.24 (using a “*Cf*” cite). But if the original Appropriations Acts were unclear on the availability issue, the “Indian canon” would require that they be read in the Tribes’ favor. On the other hand, the government never argues that the availability of appropriations to pay “initial CSCs” was limited in the first place. *Supra* Part I-B. To the contrary, as of FY1996 and FY1997 it claims “discretion” to pay or not to pay additional CSCs. *Id.*, 7 n.9. Thus, come § 314 (as the government sees it) Congress must have changed the law by now forbidding payments in excess of \$7.5 million (presumably making the Secretary’s earlier excess payments Anti-Deficiency Act violations). This absurdity aside, the point is this: even the government does not contend § 314 was a mere clarification of prior law. Neither did the district court. Aplt. Att. 27.

As for “ongoing” CSCs, the government never explains why § 314 is not a complete repudiation of Congress’s actions in FY1996 and FY1997 not to limit “ongoing” CSCs at all.

contingent on the “availability of appropriations” – fully vested. When the Secretary failed to pay, the government at that time became liable for damages for the resulting breach.

The Tribes’ contractual rights having fully vested,²⁴ Congress three years later could not wipe out those rights, as shown in *Winstar*. Tribes’ Br. 46-49. The government’s response is that *Winstar* does not apply if the Tribes assumed the risk. But the risk of what? The risk in *Winstar* was the risk that Congress years later would amend the thrift laws to eliminate the ability to capitalize goodwill, undoing transactions based upon the value of goodwill.

Similarly here, the risk of which the government speaks would have to be the risk that Congress years later would amend the earlier Appropriations Acts to make unavailable the appropriations which had been available at the time, again undoing vested and completed transactions. Unlike in *Winstar*, the

²⁴ With nary a citation, the government asserts that since ISDA contracts are not “procurement contracts,” the ordinary and unchallenged rule of *Blackhawk Heating v. United States*, 622 F.2d 539 (Ct. Cl. 1980) should not apply. Tribes’ Br. 26 n.46 (contract payment rights vest upon the enactment of available appropriations, even if initially conditioned upon the “availability of appropriations”). The government does not explain why the rule here would (or should) be different when the precise same terms of art in appropriations law and contract law are at issue. Moreover, Congress exempted ISDA contracts from the rigid federal procurement rules precisely to benefit tribes, not to hurt them. S. Rep. 100-274, at 18-19 (1987) (explaining § 450b(j)) (Aplt. Att. 110-111); S. Rep. 103-374, at 6-7 (1994) (explaining § 450j(a)(1)) (Aplt. Att. 315).

government here does not even attempt to argue the Tribes assumed that risk.²⁵

So, the government falls back to arguing other things that have nothing to do with the application of *Winstar*.²⁶

The best the government can argue is that “Congress . . . reserved by statute and in the contract” “the power to deny the Tribes of any payment by exercise of its right not to appropriate funds” (Gov’t Br. 50). But Congress did appropriate funds. It is absurd for the government to argue that Congress’s

²⁵ Earlier in its brief the government contends the Tribes should have known there were chronic shortfalls (as if this could be a legal excuse for IHS violating the ISDA). Gov’t Br. 24. But the only “shortfalls” here were of IHS’s own making in redirecting its ever-increasing lump-sum appropriation to other purposes. Moreover, proof at trial would have shown there were no shortfalls in FY1994 and hardly any before then (Aplt. App. 131); that when IHS negotiated the first Shoshone-Paiute contract in 1995 it assured the Tribes they would be fully paid in FY1996; and that when this did not happen the Tribes were again assured they would be fully paid in FY1997.

Consistent with § 450j-1(b)(2), (5), one of the Shoshone-Paiute Tribes’ AFAs has an “adjustment” clause that is expressly “subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.” Aplt. App. 342. The Cherokee’s similar adjustment clause is narrowly conditioned on “enactment of relevant Appropriations Acts,” and requires Tribal “agreement” for any decrease. Aplt. App. 450. The government misquotes both. Gov’t Br. 14, 15-16.

²⁶ For instance, the government falls back on *Oglala*. Gov’t Br. 51. But even *Oglala* recognizes that when appropriations are legally “available” (not the case there, but the case here), a tribe’s right to be paid surely vests. At that point, IHS “bind[s] the Government contractually.” *Oglala*, 194 F.3d at 1379. The government cannot be arguing that IHS bound the government “contractually” to pay in 1996 given that appropriations then were legally available (because they were not statutorily capped), but that the Government later ‘unbound’ itself by enacting § 314.

“reserved power” includes the power to appropriate funds, and then years later retroactively take them back after the contract has been fully performed. As the *Winstar* Court instructed, Congress’s “sovereign power” simply does not reach that far.²⁷ Just as in *Winstar*, it is the government that assumed the risk of what occurred here: that a Tribe’s contractual right to have the Secretary pay would vest upon the appropriation of available funds, exposing the government to liability if payment was then not made.

Finally, the government argues that § 314 actually concerns the ISDA’s reduction clause, and that it “clarifies Congress’ intent in the ISDEA” that “the Secretary was not required to fund CSC fully even before Section 314 was enacted, since doing so would have required [the Secretary] to take funds from existing programs.” Gov’t Br. 51-52. But § 314 nowhere even cites the ISDA and it certainly does not speak in terms of the reduction clause; it only speaks to the “amounts [that are] available.”²⁸

²⁷ The Court in *Winstar*, 518 U.S. at 881, rejected the government’s reliance (repeated here, *see* Gov’t Br. 52) on *Bowen v. Public Agencies*, 477 U.S. 41 (1986), which likewise held that “sovereign power” does not include “the power to repudiate its own debts . . . simply in order to save money.” *Id.* at 55.

²⁸ *See also TVA v. Hill*, 437 U.S. 153, 190 (1978) (implied repeals from appropriations act riders are heavily disfavored); *Shoshone III*, 58 F.Supp.2d at 1201 (rejecting § 314 as an amendment to the ISDA).

The government's diffuse arguments here reflect the dilemma it faces. Notwithstanding the Ninth Circuit's surprising ruling in *Shoshone IV*, the government cannot change position by now arguing that IHS's payment of any CSCs were capped and that appropriations in FY1996 and FY1997 were legally unavailable. It must therefore make the unappealing argument that Congress reserved to itself the power to retroactively alter the availability of these old appropriations, or else switch and ride the "reduction clause" horse. But the first tack makes no sense, and the second one is not grounded in § 314. Thus the government's § 314 arguments ultimately collapse, and the government fails to carry its burden on its fourth defense.

B. It Is Unnecessary to Give § 314 a Retroactive Application

The government insists at length that § 314 must be given retroactive application, bolstered by *Shoshone IV*. Gov't Br. 44-49. Not so. The provision does not speak in the past tense, it has meaning in the present tense, its temporary nature is confirmed by its re-enactment every year since, and it does not meet the high standard the Supreme Court demands for retroactive legislation. Tribes' Br. 50-51.

Ignoring the necessary implication of Congress's re-enactment of § 314 every year since (*id.*), the government insists otherwise (Gov't Br. 45-46),

citing to “snippets of legislative history”²⁹ that do not address § 314 at all, but instead an entirely different matter: the appropriations committees’ decision to request a GAO study on contract support costs. *Shoshone III*, 58 F.Supp.2d at 1200-01. Even the *Shoshone IV* court did not ‘go there.’ Since § 314 can be read to have only prospective effect³⁰ – particularly based upon IHS’s own contemporaneous belief that it still had old account balances available to spend on CSCs (Aplt. App. 489) – the Indian canon counsels against giving § 314 retroactive effect.³¹

The government also argues (again without support) that somehow either the enactment of § 314 or the Senate committee’s request for a GAO study implies Committee (or, as the government always puts it, “congressional”) disagreement with the several court decisions holding the government liable for

²⁹ Gov’t Br. 39 n.18. Unlike the government’s stretch from unconnected report language to § 314, *see United States v. Koyomejian*, 970 F.2d 536, 543 (9th Cir. 1992) (Kozinski, J. concurring) (criticizing such “[i]ndiscriminate use of legislative history),” the Senate and House reports the Tribes cite concerning the ISDA Amendments are hardly “snippets;” they are both an indictment of IHS for malfeasance, and an unequivocal elimination of all agency discretion in ISDA contracting matters, including CSC issues.

³⁰ *Shoshone III*, 58 F.Supp.2d at 1197; *Appeals of Cherokee I*, slip op. 20-21 (Aplt. Att. 275-76).

³¹ Put differently, § 314 and the two prior Appropriations Acts are not “irreconcilable;” they can be read together while giving full force to each. Thus the latter did not implicitly repeal the former. *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

full CSCs in years when IHS had an unrestricted lump-sum appropriation. Gov't Br. 45-46 & n.19. Far more probative on the point, however, is Congress's decision in 2000 to re-enact the § 450j-1(b) availability and reduction clauses verbatim while aware of those court decisions. *See* 25 U.S.C. § 458aaa-18(b). After all, "Congress is presumed . . . to adopt [a judicial] interpretation when it reenacts a statute without change." *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985). Adoption of § 458aaa-18(b) thus reflects congressional adoption, not rejection, of the *Shoshone I*, *Shoshone II*, and *Appeals of Cherokee* interpretations of § 450j-1(b)'s availability and reduction clauses in the context of the 1996 and 1997 Appropriations Acts.

C. Section 314 Does Not Trigger the Appropriations Clause Barring the Payment of Money Damages

The Secretary breached the Tribes' contracts. The Tribes therefore seek money damages under the Contract Disputes Act. They do not seek long-gone appropriations. Nonetheless, the government continues to advance the false premise that this case is about compelling an agency to pay more than has been appropriated to it. Gov't Br. 53. Again, it is not.

The Tribes seek damages for the Secretary's failure to pay the Tribes when he did have the money to pay. As such, the Appropriations Clause is

satisfied because Congress has certainly appropriated the necessary funds to pay judgments awarding damages for breach of statutory or contractual rights. Tribes' Br. 52-53. Were it otherwise, a contractor whose damages award came long after the lapse of an appropriation would never have a cause of action, and the CDA would be meaningless. That, of course, is not the law.

While the government makes much of the commonplace that an agency cannot spend more than it has (Gov't Br. 53-54), this suit does not seek otherwise; it seeks damages because the agency failed to pay the Tribes the money it did have. Yes, Congress in § 314 limited what IHS could do with its remaining appropriated funds. But just as in *Bath Iron v. United States*, 20 F.3d 1567, 1580-83 (Fed. Cir. 1994), Congress in § 314 did not limit a court's authority under § 450m-1(a) to award money damages when warranted, nor the availability of the Permanent Judgment Fund appropriation to pay such an award. 31 U.S.C. § 1304(a); Tribes' Br. 53.³²

³² In a sense, the government's argument tries to put the Tribes in the position of being a creditor with a non-recourse loan against IHS. Even if IHS has the money, it is argued, the government cannot be sued if IHS spends the money some other way. It is that kind of twisted reasoning that led Congress to extend the Contract Disputes Act to ISDA contracts. § 450m-1(d); S. Rep. 100-274, at 34-38 (Apl. Att. 118-122).

III. THE “*NEW YORK AIRWAYS*” RULE MAKES THE GOVERNMENT LIABLE EVEN WHEN (UNLIKE HERE) AGENCY APPROPRIATIONS ARE NOT AVAILABLE TO FULLY PAY A GOVERNMENT CONTRACT

As discussed above, appropriations were legally available at the relevant times to fully pay the Tribes’ contracts, including “ongoing” and “initial” CSCs. The Secretary stands in breach. Section 314 did not (and could not) retroactively undo the government’s breach of contract for failing to timely and fully pay in those years. As such, there is simply no occasion to consider the government’s liability for damages had all this not been the case. But the government’s brief presses this point from start to finish, compelling a short response.

The Tribes’ opening brief explains that the *New York Airways* rule of contract damage liability applies under the ISDA because (1) the Secretary had unconditional “contracting authority” to award these contracts under § 450f(a)(1);³³ and (2) the ISDA’s “availability” language does not condition that

³³ The government’s dispute on this point (Gov’t Br. 57 n.26) is simply wrong. Nothing in § 450j-1(b) conditions “the agency’s authority to bind the government” under §§ 450f(a)(1) and 450j-1(g). Likewise, the government errs in repeatedly claiming that “The provision authorizing such contracts” – which is § 450f(a)(1) – “however, makes them ‘subject to the availability of appropriations,’ and declares that the Secretary ‘is not required to reduce funding for . . . a tribe to make funds available to another tribe.’” *E.g.*, Gov’t Br. 2. That is not what § 450f(a)(1) says, and the government’s rewrite certainly does not “liberally construe[] [§ 450f(a)(1)] for the

measure at all (instead, it expressly only conditions the Secretary’s “provision of funds,” § 450j-1(b), and the “amount” “the Secretary shall make available,” § 450l(c)(sec. 1(b)(4)).³⁴ Thus, had the Secretary failed to secure available appropriations to pay the Tribes’ contracts (again, not the case here), the breach would still be actionable in damages. Tribes’ Br. 54-58.

The government responds by quoting the district court’s discussion of *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966). Gov’t Br. 55. But the problem with that discussion, like the *Oglala* court’s, is its inaccuracy. The *New York Airways* statute (even more than § 450j-1(b)’s “availability” clause) limited the agency’s payments to “appropriations made to the Board for that purpose.” 49 U.S.C. § 1376(c) (repealed). The Court of Claims found the government liable when appropriations ran out, concluding *inter alia*:

It 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. * * * . The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the

benefit of the Contractor.” § 450l(c)(sec. 1(a)(2)).

³⁴ Reliance on § 450j(c) is misplaced because that provision only applies to the “out” years of multi-year contracts. Here, the Tribes’ claims involve annual funding agreements only.

Government from making disbursements, but such rights are enforceable in the Court of Claims.

369 F.2d at 748. The court goes on to explain that the same outcome is even more apparent when “Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost” – here, the size of an ISDA contract – “and then makes an appropriation inadequate to do the whole of it or makes none at all.” *Id.* at 749. In that event, all work performed under the contract “creates a liability on the part of the Government to pay for it.” *Id.*

The government’s effort to distinguish § 450j-1(b) from the *New York Airways* statute is unavailing; the government is liable when (unlike here) the Secretary’s breach is the result of an appropriations limitation.³⁵

The government’s related argument that § 314’s “notwithstanding” clause makes the Judgment Fund appropriation unavailable to pay damage awards (Gov’t Br. 56), disregards § 314’s text, which neither speaks to that appropriation

³⁵ On this point, the government throughout its brief cites not only to *Oglala*, but also to *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) and *Shoshone IV*. But in the former case the D.C. Circuit was not confronted with a damages claim at all. Though its discussion of limited appropriations is technically *dicta*, see *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995), the D.C. Circuit’s carefully chosen words accurately describe the Secretary’s responsibilities when appropriations are not available – as contrasted with the government’s underlying liability in damages for any unpaid amounts. As for *Shoshone IV*, the court there simply cited *Oglala* without further analysis.

nor to court judgments for damage awards.³⁶

CONCLUSION

For the foregoing reasons and those set forth in the Tribes' Opening Brief, the judgment below should be reversed.³⁷

DATED this 11th day of February 2002.

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³⁶ *Supra*, at 23. Even if it did, it would not bar a damages award, but only its collectability from the Treasury.

³⁷ The government's parting shot on a jurisdictional issue misses the mark. This action was properly brought in the district court under the provisions of § 450m-1(a) and (d). Under those unique provisions, the district court's jurisdiction is "concurrent with the United States Court of Claims."