

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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No. 01-7106

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CHEROKEE NATION OF OKLAHOMA, *et al.*

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA

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**BRIEF FOR THE APPELLEES**

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**JURISDICTIONAL STATEMENT**

Appellees are satisfied with appellants' statement of jurisdiction.

**STATEMENT OF THE ISSUES**

The Indian Self-Determination and Education Assistance Act ("ISDEA" or "Act"), 25 U.S.C. §§ 450-450n, authorizes the Secretary of Health and Human Services to enter into contracts with Indian tribes for the administration of programs that the Secretary would otherwise administer. The Act also provides that the

Secretary shall pay "contract support costs" (or "CSC") to cover the direct and indirect expenses of administering such contracts. The provision authorizing such contracts, however, makes them "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available to another tribe." 25 U.S.C. § 450j-1(b). In a 1998 appropriations law, Congress enacted a further limit on spending under the ISDEA. In particular, Section 314 of the Omnibus Consolidated Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314"), declares that the amounts "earmarked" in prior committee reports for contract support costs "are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . ."

The issues presented are:

1. Whether the district court correctly held that, under 25 U.S.C. §450j-1(b), the Indian Health Service (IHS) is not liable for the Tribes' claims for contract support costs when IHS appropriations are not available to pay them.
2. Whether the district court properly rejected the Tribes' argument that even if no appropriations are available, the government is nonetheless liable for the Tribes' contract support costs under the ISDEA.

3. Whether the district court correctly held that, under Section 314, the Tribes may not recover contract support costs where the amount "earmarked" in the committee reports was not sufficient to cover those costs.

## STATEMENT OF THE CASE

### A. Nature Of The Case.

This is one in a series of recent cases by tribes alleging violations of various provisions of the ISDEA in connection with the government's funding of the tribes' operation of programs and services pursuant to self-determination contracts. Every appellate court<sup>1</sup> to have considered the issue has construed 25 U.S.C. § 450j-1(b) as unambiguously conditioning the funding of self-determination contracts on "the availability of appropriations." *See Shoshone-Bannock Tribes v. Thompson*, 269 F.3d 948, 952 (9th Cir. 2001);<sup>2</sup> *Babbitt v. Oglala Sioux Tribal Public Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd. v. Babbitt* ("RNSB"), 87 F.3d 1338, 1345 (D. C. Cir. 1996). In other

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<sup>1</sup> *See also California Rural Indian Health Bd. v. Shalala* ("CRIHB"), No. C-96-3526-DLJ (N.D. Cal. July 13, 2001), *appeal pending*, *CRIHB v. Thompson*, Nos. 01-16802, 16880 (9th Cir.).

<sup>2</sup> Plaintiffs repeatedly cite the district court decision in *Shoshone-Bannock Tribes v. Shalala*, which was reversed by the Ninth Circuit on appeal in the case cited in the text. 58 F. Supp. 1191 (D. Ore. 1999), *rev'd sub. nom. Shoshone-Bannock Tribes v. Thompson*, 269 F.3d 948 (9th Cir. 2001).

words, these courts have concluded that if Congress fails to appropriate sufficient funds, the agency can only spend as much money as has been appropriated for a particular purpose.

In this case, plaintiffs brought suit against the United States, the Secretary of Health and Human Services ("HHS") and Michael Trujillo, Director of the HHS's Indian Health Service (collectively "the Secretary" or "IHS"), alleging that IHS failed to pay the CSC claimed by the Tribes for operating certain new and ongoing Indian health care programs in fiscal years (FYs) 1996 and 1997. Specifically, plaintiffs alleged a contractual and statutory entitlement to immediate payment of full CSC funding, despite express language in the ISDEA (incorporated in the self-determination contracts) limiting payment to the availability of appropriations. Plaintiffs sought "money damages" and a declaratory judgment that Section 314 has no application in this case.<sup>3</sup>

The district court granted summary judgment in favor of the Secretary, holding, consistent with the above appellate decisions, that the ISDEA contracts at issue are conditioned on IHS having sufficient funding. The court found that because all of the

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<sup>3</sup> As noted in appellants' Statement of Jurisdiction (Br. 1), the ISDEA provides for district court jurisdiction in this type of case against the Secretary. 25 U.S.C. §450m-1(a).

\$7.5 million appropriated by Congress for new CSC in FYs 1996 and 1997 had been allocated to other tribes before IHS reached plaintiffs' request for CSC for their new programs, IHS was not obligated to pay CSC beyond the limits of the appropriated funds. The court also concluded that Section 314 by its plain language capped the amount that IHS could spend on CSC for ongoing contracts during the relevant FYs at the amounts earmarked in appropriation committee reports for that purpose. Plaintiffs now appeal.

**B. Statutory Scheme.**<sup>4</sup>

**1. The ISDEA.**

The ISDEA requires that the Secretary,<sup>5</sup> "upon the request of any Indian tribe by tribal resolution," enter into "a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof" which the Secretary previously administered for the benefit of Indians pursuant to his statutory authority. 25 U.S.C. § 450f(a)(1). The Indian Health Service, a component of HHS, is responsible for providing primary health care for American Indians and

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<sup>4</sup> Relevant portions of the ISDEA, 25 U.S.C. §§ 450 *et seq.*, are reproduced in an addendum ("Add.") to this brief.

<sup>5</sup> The Act defines "Secretary" to mean either the Secretary of the Interior or the Secretary of HHS or both. 25 U.S.C. § 450b(i). Only the Secretary of HHS is a party in this case.

Alaska Natives throughout the United States. *See* 25 U.S.C. § 13; 25 U.S.C. § 1601; 42 U.S.C. § 2001. IHS either directly operates, or enters into self-determination contracts with tribes to operate, approximately 150 health care delivery programs across the country. The ISDEA requires the Secretary to provide funding under self-determination contracts equal to the amount of funds he otherwise would have provided if the programs were operated by IHS – *i.e.*, the "Secretarial amount." 25 U.S.C. § 450j-1(a)(1).

In addition, the Act directs that CSC be added to the funding amount provided by the Secretary, to cover certain direct and indirect costs that would not have been incurred by the Secretary if IHS operated the programs.<sup>6</sup> 25 U.S.C. § 450j-1(a)(2). Significantly, the Act conditions all funding of self-determination contracts on the "availability of appropriations" and the Secretary's obligation to continue to operate programs for non-contracting tribes. An unnumbered paragraph at the end of § 450j-1(b) states:

Notwithstanding any other provision in this subchapter, the provision of

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<sup>6</sup> "Contract support costs" are not defined in the definitions section of the ISDEA; however, the phrase is generally understood to include direct and indirect costs. The Act defines "direct program costs" to mean "costs that can be identified specifically with a particular contract objective." 25 U.S.C. § 450b(c). "Indirect costs" include "costs incurred for a common or joint purpose benefiting more than one contract objective . . . ." *Id.* at § 450b(f).

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.

25 U.S.C. § 450j-1(b) (emphasis added); *see also id.* at § 450j(c) ("The amounts of such [self-determination] contracts shall be subject to the availability of appropriations").

Each self-determination contract entered into under the ISDEA must contain or incorporate by reference the provisions of a statutorily-prescribed model agreement. 25 U.S.C. § 450l(a). A required provision of the model agreement pertaining to funding states that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement [negotiated by the parties]." *Id.* at § 450l(c) (Model agreement, sec. 1 at ¶(b)(4)) (emphasis added).

## **2. Congressional Appropriations For CSC.**

For FY 1996, the House Committee on Appropriations recommended that a total of \$1.7 billion be appropriated to IHS, with \$153 million to be spent on CSC for existing self-determination contracts and \$7.5 million to be used to pay CSC for new or expanded self-determination contracts. *See* Department of Interior and Related Agencies Appropriation Bill, 1996, H.R. Rep. No. 104-173, at 97 (1995). In the

appropriations act itself, Congress segregated \$7.5 million from the lump-sum appropriation into a separate Indian Self-Determination Fund ("ISD Fund") which was to "remain available until expended" for new or expanded contracts. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

Similarly, for FY 1997, Congress appropriated a lump-sum of approximately \$1.8 billion to IHS for administration of the ISDEA, of which \$160,660,000 was earmarked in the appropriations committee report to be spent on CSC. *See* S. Rep. No. 104-319, at 90 (1996). Congress again set aside \$7.5 million in the ISD Fund for new or expanded contracts.<sup>7</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213 (1996).

### **3. IHS' Implementation.**

Congress recognized the difficulty IHS faced in allocating finite resources among competing Tribal interests and left to IHS' discretion how best to distribute those resources. The ISDEA therefore provides that "[p]ayments . . . under any [self-

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<sup>7</sup> In FY 1998, Congress enacted a statutory cap in the appropriations act for that FY on the amount that could be obligated by IHS for CSC. Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997)("not to exceed \$168,702,000 shall be for payments to tribes . . . for [CSC] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended").

determination] contracts pursuant to section 450f . . . of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part." 25 U.S.C. § 450j(b). Because of chronic congressional under-funding of CSC, IHS developed an allocation policy to deal with anticipated appropriations shortfalls. *See* IHS Circular No. 96-04 (April 12, 1996); Indian Self-Determination Memorandum No. 92-2 ("ISDM 92-2") (Feb. 27, 1992).<sup>8</sup> Aplt. App. 199-207, 208-33.

IHS established three pools of funding within its single budget activity for CSC: (1) Pool No. 1 (the ISD Fund) represents any increase in IHS' appropriation for CSC for new and expanded contracts; (2) Pool No. 2 (Ongoing Awards) represents amounts awarded in a prior year that are made available to IHS on a recurring basis; and (3) Pool No. 3 (Mandatory Increases/Shortfall Funds) represents "amounts provided for mandatory increases on the prior year 'base' and shortfall funds, if appropriated." IHS Circular 96-04 § 4 (Aplt. App. 216).

With respect to funding Pool No. 1, or the ISD Fund, IHS determined that it would place all requests in a queue or priority list based on date of receipt. IHS Circular No. 96-04 § 4(A)(4)(a)(iii) (Aplt. App. 217). Approved requests for contract

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<sup>8</sup> These handbooks are internal agency guidelines adopted by the Secretary pursuant to 25 U.S.C. § 450k(a)(1) and 25 C.F.R. § 900.5

support costs would be 100% funded on a first-come first-served basis. *Id.* at § 4(A)(4)(a)(ii) (Aplt. App. 217). Once funds were exhausted, however, Tribes awaiting new CSC funding on the priority list would be provided new CSC funds according to the date of the individual request, when additional appropriations were made available. *Id.* In the year a Tribe reached the top of the queue, it would be paid its new CSC for that year and would continue to be paid at least that amount of CSC costs for the newly funded program every year thereafter. Fitzpatrick Decl. ¶ 23 (Aplt. App. 536).

As for ongoing awards (funding Pool No. 2), each tribal contractor's indirect CSC need is determined by calculating any changes in indirect cost rates. If the funds available in the IHS Area office's indirect cost base are not adequate to meet all contractors' needs, then the amount available is distributed according to each tribe's proportion of total need. These funds are awarded as nonrecurring funds. IHS Circular No. 96-4 § 4(b) (Aplt. App. 220).

Finally, mandatory increases that reflect a percentage of the Area's prior year recurring indirect cost base are distributed annually, as available. Additional shortfall funds that are made available and allocated to Area offices are also distributed annually. Because tribes are required to rejustify their needs for indirect CSC each

year, amounts required for indirect CSC may exceed the amount available for this purpose. If a tribe's additional need is proportionately greater, it will receive a greater percentage of CSC mandatory increases and shortfall funds. *Id.* at § 4(c) (Aplt. App. 220).

IHS developed this CSC payment system with the active participation of representatives from Indian Tribes. IHS Circular No. 96-04 § 2 (Aplt. App. 208-09). The procedures have been applied to self-determination contracts since 1992 and were subsequently applied to self-governance compacts. IHS Circular No. 96-04 § 2 (Aplt. App. 209). Tribal consultation has thus been an integral part of the formulation and implementation of IHS' contract support cost policy. Fitzpatrick Decl. ¶ 24 (Aplt. App. 536-37).

Each tribe's indirect cost rate is determined through negotiation with the Department of the Interior's Office of the Inspector General. *See generally RSNB, supra*, 87 F.3d 1338. Further, tribes may request direct CSC for certain costs not included in the indirect cost rate. *See* IHS Circular 96-04 § 4(A)(2)(b) (Aplt. App. 212-13).

Following Congress' recommendation and IHS' CSC allocation policy, IHS distributed its limited appropriation for new CSC requests on a first-come, first-

served priority basis in both FYs at issue here. Because the requests for CSC for new and expanded contracts for FYs 1996 and 1997 were well in excess of the \$7.5 million in new congressional funding, full CSC funding was delayed for some tribes. Fitzpatrick Decl. ¶ 22 (Aplt. App. 535-36).

#### **4. Section 314.**

On October 21, 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act , 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998), which imposed a mandatory cap on the total amount of contract support cost funding for new and expanded programs that IHS may distribute annually to self-determination contractors nationwide. Section 314 states in pertinent part (emphasis added):

*Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Law 103-138, 103-332, 104-134, 104-208, and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .*

The public laws cited in the statute had earmarked \$7.5 million for the payment of

CSC for new and expanded programs each year between 1994 and 1998. In particular, Public L. No. 104-134, 110 Stat. 1321-189 (1996), and Public L. No. 104-208, 110 Stat. 3009-212 (1996), are the appropriations acts for FYs 1996 and 1997, which were discussed above. Section 314 therefore clarified Congress's intent that \$7.5 million ISD Fund was "all there [wa]s" for new CSC in those years. *See Shoshone-Bannock*, 269 F.3d at 954. Further, Section 314 capped the total amount for CSC shortfalls in those years at the amounts earmarked in committee reports, and prohibited IHS from using *future* funding to pay shortfalls for *previous* years.

### **C. Statement of Facts.**

#### **1. The Cherokee Nation.**

Plaintiff Cherokee Nation of Oklahoma ("Cherokee") has operated various IHS-funded health care programs under one or more self-determination contracts for a number of years. In FY 1994, Cherokee entered into a Compact of Self-Governance and associated Annual Funding Agreement ("AFA") with the United States which covered pre-existing programs that had already been subject to self-determination<sup>9</sup>. Aplt. App. 422. The Compact expressly states that the Secretary's

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<sup>9</sup> Both of the Tribes in this case are parties to compacts with IHS. However, because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, *see id.* at § 450j-1(b), the terms  
(continued...)

provision of funds to the Tribe as specified in the Annual Funding Agreement will be subject to the appropriation of funds by Congress and subject to such statutory limitations as may be enacted. It states as follows:

Section 3 -- Funding Amount. *Subject only to the appropriation of funds by the Congress of the United States*, and to adjustments pursuant to [25 U.S.C. § 450j-1], as amended the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement . . . In accordance with [25 U.S.C. § 450f], as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

Compact of Self-Governance Between the United States of America and the Cherokee Nation, art. IV, sec. 3 (June 30, 1993) (Aplt. App. 425) (emphasis added).

Cherokee's Annual Funding Agreement for FY 1997 also states that funding is contingent on the availability of appropriations. It specifically states that "[t]he parties agree that adjustments may be appropriate due to unanticipated Congressional action." FY 1997 AFA Between the United States of America and Cherokee Nation, sec. 10 (Aplt. App. 450).

Cherokee assumed responsibility for operating the Sallisaw Clinic in 1992, the Stilwell Clinic in 1994, and the Contract Health Services Out-Patient Program in

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<sup>9</sup>(...continued)  
"contract" and "compact" have been used interchangeably throughout this litigation.

1995. Aplt. App. 93-94 at ¶¶ 67, 69, 70. In 1996, Cherokee requested CSC for these new programs and was placed on the Indian Self Determination queue with the understanding that sufficient congressional appropriations were not presently available. Fitzpatrick Decl. ¶ 25 (Aplt. App. 537); ISD Queue (Aplt. App. 234, 235). IHS had already spent \$7.5 million on new CSC for tribes ahead of Cherokee on the queue, and Cherokee had not yet reached the top of the queue. Cherokee thus did not receive any additional funding for CSC for those new programs in FY 1997. Fitzpatrick Decl. ¶ 25 (Aplt. App. 537).

In FY 1997, IHS paid Cherokee \$1.6 million in indirect contract support costs. However, the Tribe claimed that its need was \$4.6 million for those costs for that year. Compl. ¶¶ 30-31 (Aplt. App. 43-44).

## **2. The Shoshone-Paiute Tribes.**

Plaintiff Shoshone-Paiute Tribes of the Duck Valley Reservation ("Shoshone") entered into a Compact of Self-Governance with the United States in 1994. Aplt. App. 293. Like plaintiff Cherokee, plaintiff Shoshone agreed in its Compact that funding would be subject to the availability of congressional appropriations and any other statutory limitations. The Compact provided:

Sec. 3 – Funding Amount. *Subject only to the appropriation of funds by the Congress of the United States* and to adjustments pursuant to [25

U.S.C. § 450j-1] of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Compact of Self-Governance Between the Duck Valley Shoshone -Paiute Tribes and the United States of America, art. II, sec. 3 (Oct. 1, 1994, as amended Oct. 1, 1995) (Aplt. App. 302) (emphasis added).

Shoshone's Annual Funding Agreements for FYs 1996 and 1997 include a similar agreement between the parties that the amount of funding in the Agreement shall be adjusted as necessary according to the availability of funds. It states as follows:

The parties to this Agreement recognize that the total amount of the funding in this Agreement *is subject to adjustment due to Congressional action in appropriations Acts* or other laws affecting the availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary . . . .

AFA Between the Duck Valley Shoshone-Paiute Tribes and the Sec'y of the Dep't of HHS of the United States of America, sec. 9(a) (Oct. 1, 1995) ("Shoshone's FY 1996 AFA") (Aplt. App. 342) (emphasis added) ; *see also* AFA Between the Duck Valley Shoshone-Paiute Tribes and the Sec'y of the Dep't of HHS of the United States of America, sec. 9 (Oct. 1, 1996) ("Shoshone's FY 1997 AFA) (Aplt. App. 374)) ("The

parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations.").

Shoshone's FY 1996 Annual Funding Agreement also states that it is governed by ISDM 92-2, which established IHS' policy regarding the priority list or queue system for allocating CSC on a first-come, first-served basis. *See* Shoshone's FY1996 AFA, sec. 7(b) (Aplt. App. 341) ("[T]he provisions of the Indian Health Service's ISDM 92-2 shall be applied to additional program funding for activities assumed by the Tribes as an expansion of the existing operations described in subparagraph (a) above [dealing with indirect contract support costs]"). Shoshone therefore expressly agreed to the policy by which IHS allocated funds according to the queue system.

Shoshone assumed responsibility for operating the Owhyee Hospital and the Managed Care Program, and at its own request was placed on the Indian Self-Determination queue for CSC for these newly acquired and contracted programs in 1995, with the understanding that sufficient Congressional appropriations were not presently available. Fitzpatrick Decl. ¶ 26 (Aplt. App. 537); *see also* ISD Queue (Aplt. App. 241). In FYs1996 and 1997, Shoshone had not reached the top of the queue. Thus, the Tribe did not receive any additional funding for these new programs

in either year because IHS had already on the queue allotted the \$7.5 million allotment to other tribes already ahead of Shoshone. Fitzpatrick Decl. ¶ 26 (Aplt. App. 537).

**D. Course of Proceedings And Disposition Below**.<sup>10</sup>

On March 5, 1999, Cherokee and Shoshone filed this action<sup>11</sup> in district court against the Secretary, alleging two cause of action: (1) that IHS had breached its self-determination contracts with the Tribes by failing to pay adequate CSC; and (2) that IHS violated the ISDEA by failing to pay adequate CSC. In a First Amended Complaint ("Compl.") filed May 17, 1999, plaintiffs added the United States as a defendant and added a third cause of action seeking declaratory relief. *See* Compl. (Aplt. App. 34). The complaint averred that Cherokee was entitled to CSC in the total amount of \$484,685 for the Sallisaw and Stilwell Clinics and the Out-Patient

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<sup>10</sup> Prior to filing this lawsuit, Cherokee submitted a claim to the agency pursuant to the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 601 *et seq.* *See* Aplt. App. 480. After the claim was not decided within 60 days of receipt, Cherokee elected to treat the claim as denied and filed this action. *See* 41 U.S.C. § 605(c)(5). Shoshone similarly filed CDA claims with the agency for FYs 1996 and 1997 (Aplt. App. 399, 403), and, when the claims were not decided within the statutory period, elected to deem the claims denied and filed suit.

<sup>11</sup> The complaint was brought on behalf of the named Tribes and a purported class of similarly situated tribes. The district court denied class certification in a ruling issued on February 9, 2001, *see Cherokee Nation v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). Plaintiffs are not appealing that ruling. *See* Aplt. Br. 4 n.4.

Program in FY 1997. Compl. ¶¶ 31, 32 (Aplt. App. 44). Cherokee also alleged it was entitled to the full amount of indirect CSC (\$2,952,183.27) it requested for its ongoing programs in 1997. Compl. ¶ 31 (Aplt. App. 44 ). The complaint further alleged that Shoshone was entitled to the full amount of CSC for the Owhyee Hospital and Managed Care programs for FYs 1996 (\$1,667,566) and 1997 (\$1,847,196). Compl. ¶¶ 14, 15 (Aplt. App. 39, 40). Plaintiffs sought "money damages" and a declaratory judgment that Section 314 is inapplicable in this case.

The matter came before the district court on cross-motions for summary judgment. In granting summary judgment in favor of the Secretary, the court concluded that plaintiffs have neither a statutory nor a contractual entitlement to the CSC they requested in this case.

The district court first held that the ISDEA "specifically states" that IHS' obligations to pay CSC "are dependent on funding." Aplt. Attach. 23 (citing 25 U.S.C. § 450j-1(b)). Noting that all contracts and compacts entered into under the Act contain the "[su]bject . . . to the appropriations of funds" proviso, the court concluded that "the contracts at issue are conditioned on the IHS having sufficient funding." *Id.* In so holding, the court found support in the Federal Circuit's decision in *Oglala, supra*. *Oglala* held that "[t]he language of § 450j-1(b) is clear and

unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" 194 F.3d at 1378. The court therefore rejected "the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are 'subject to availability of appropriations' limits only the Secretary's ministerial duty to disburse funds but not her ultimate liability for full contract support costs." Aplt. Attach. 23. The court stated that "[t]o adopt plaintiffs' interpretation would render the phrase 'availability of appropriations' meaningless." *Id.* Rather, the court agreed with the Federal Circuit that "the statute is unequivocal, if the money is not available, IHS does not have to provide it." *Id.* at 24.

The court next rejected plaintiffs' argument that IHS was required to take funds from its annual lump-sum appropriations during the relevant FYs to pay the Tribes' CSC request. The court found that all of the money appropriated to IHS for FYs 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. "Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs." Aplt. Attach. 25. The court also reasoned that IHS could not use any of its annual lump-sum appropriations to pay the Tribes' CSC request "without impairing its ability to discharge its responsibilities

with respect to other tribes and individual Indians. Such a reduction could severely impair various Indian programs." *Id.* at 25-26. The court stated that §§ 450f & 450j-1(b) of the ISDEA "prohibit[] the IHS from reducing funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization to fund their self-determination contracts." *Id.* at 26.

In addition, the court found that IHS was allocated only \$7.5 million for the payment of new CSC in the years in the question, and that "the plain language of Section 314 caps the amount the government can spend on new [CSC] to \$7.5 million." *Aplt. Attach. 27.* The court explained that plaintiffs did not receive any additional funding for their new programs in FYs 1996 and 1997 "because IHS had already disbursed its \$7.5 million allocation to tribes ahead of [Cherokee and Shoshone] on the queue list." *Aplt. Attach. 28.* The court agreed with the Secretary's argument that to require IHS to pay additional CSC "would violate the appropriations clause because it would require spending money that had not been appropriated by Congress." *Id.* (citing *OPM v. Richmond*, 496 U.S. 414, 424, 426 (1990)).

Finally, the court rejected plaintiffs' argument that Section 314 cannot be applied to destroy their contractual rights to CSC. The court dismissed plaintiffs'

reliance on *United States v. Winstar Corp.*, 518 U.S. 839 (1996), concluding that "[i]n the instant case, there is no evidence that the government intended to assume the risk if Congress failed to provide sufficient appropriations." Aplt. Attach. 29. Accordingly, the district court granted summary judgment in favor of the Secretary.

### **STANDARD OF REVIEW**

This Court reviews a district court's grant of summary judgment *de novo*, "apply[ing] 'the same legal standard employed by the district court.'" *Lamb v. Thompson*, 265 F.3d 1038, 1045 (10th Cir. 2001) (quoting *Kingsford v. Salt Lake City Sch. Dist.*, 247 F.3d 1123, 1127-28 (10th Cir. 2001)). Statutory construction is a purely legal question, *see United States v. Diaz*, 989 F.2d 391, 392 (10th Cir. 1993); thus, the district court's construction of the ISDEA is subject to *de novo* review by this Court, *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996).

### **SUMMARY OF ARGUMENT**

As the district court here concluded, and as three circuits have now also held, the ISDEA states in clear, unambiguous language that "notwithstanding any other provision" of the Act, the requirement of funding of self-determination contracts is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b); *see Shoshone-Bannock*, 269 F.3d at 952; *Oglala*, 194 F.3d at 1378; *RNSB*, 87 F.3d at 1345. The

Act requires that self-determination contracts contain this condition. *Id.* at § 450l(c). Moreover, the ISDEA provides that "the Secretary is not required to reduce the funding for programs, projects, or activities" serving other tribes in order to fully fund a self-determination contract. *Id.* at § 450j-1(b). In other words, Congress declared in the ISDEA that the Secretary is not required to "rob Peter to pay Paul." Consequently, if funding CSC or other aspects of self-determination contracts would require the Secretary to *reduce* funding for other IHS initiatives serving non-contracting tribes, contracting tribes do not have an entitlement to full payment. The statute therefore does not obligate the Secretary to fund the Tribes' FYs 1996 and 1997 CSC beyond the amount of appropriations made available for that purpose. Thus, as we show below, the district court was correct in holding that the Tribes are not entitled to additional CSC for those years.

For FY 1996, the House Appropriations Committee recommended that only \$7.5 million of IHS' \$1.7 billion lump-sum appropriation be spent on CSC for new or expanded self-determination contracts. In the 1996 Appropriations Act itself, Congress specifically appropriated \$7.5 million to an ISD Fund for CSC to be spent on new or expanded self-determination contracts. Congress similarly appropriated only \$7.5 million to an ISD Fund in FY 1997. Because the requests for CSC for new

or expanded contracts for the FYs at issue were well in excess of the \$7.5 million in new congressional funding each year, the Secretary allocated the limited funds on a first-come, first-served priority basis in accordance with Congress' recommendation and an internal agency guideline specifically designed to deal with such funding shortfalls. In doing so, the Secretary effectuated the congressional intent of funding CSC to the extent of available appropriations, without taking money away from programs serving other tribes.

The district court also correctly held that the Tribes have no contractual right to full funding of its CSC. The contracts at issue incorporated the applicable statutory limitations; thus, the Secretary's contractual obligation to fund CSC was contingent on the availability of appropriations. Because Congress' recommendations and the spending bills limited the amount of funds available, IHS is not obligated to pay any CSC beyond the constraints established by Congress.

As we show further, Congress's 1998 enactment of Section 314 confirms the correctness of the Secretary's construction of the ISDEA and the limits on CSC funding. Section 314 declares that "amounts appropriated to or earmarked in committee reports . . . for payments to tribes . . . for [CSC] . . . are the total amounts available for FYs 1994 through 1998 for such purposes . . . ." As Section 314 thus

makes it clear, and the district court held, the Secretary's authority to obligate funds for CSC under the ISDEA during the pertinent FYs was limited to the amounts earmarked in committee reports and appropriated each year. Moreover, even prior to Section 314's enactment, the Tribes had no unconditional right, fully vested or otherwise, to full CSC funding under the ISDEA. Rather, as we explain, funding was always contingent on the availability of appropriations, and plaintiff specifically contracted with knowledge of that contingency and knowledge of the historical under-funding of CSC and the existence of the first-come, first-served queue. Because Section 314 simply clarifies Congress' original intent, its application here would not repudiate any fixed right of plaintiff. The district court was therefore entirely correct in holding that Section 314 is applicable in this case. As we discuss, the court in *Shoshone-Bannock, supra*, also upheld Section 314's application in an almost identical case.

In addition, because IHS had already reached the statutory funding limit for new CSC as a consequence of paying the CSC requests of other tribes higher up on the priority list than the plaintiffs, provision of funds to plaintiffs now, in excess of that limit, would violate the Appropriations Clause. That Clause commands that no money may be paid out of the Treasury unless it has been appropriated by an act of

Congress. Art. I, § 9, Cl. 7. The district court was therefore correct in denying relief on that basis.

In sum, the district court's decision is fully supported by the plain language of the ISDEA and Section 314, the express limitations in the Tribes' self-determination contracts with IHS, and three circuit court decisions. Its judgment should therefore be affirmed by this Court.

## ARGUMENT<sup>12</sup>

### **I. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIBES HAVE NO STATUTORY ENTITLEMENT TO FUNDING OF THEIR CONTRACT SUPPORT COSTS BEYOND AVAILABLE APPROPRIATIONS.**

Statutory construction begins with the plain language of the statute under scrutiny. *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *Colorado High Sch. Activities Ass'n v. National Football League*, 711F.2d 943, 945 (10th Cir. 1983). Thus, "[i]n the absence of an

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<sup>12</sup> The issues raised in this appeal were raised in district court in plaintiffs' motion for partial summary judgment as to liability on the first and second causes of action (breach of contract and statutory violations) (Aplt. App. 70), in plaintiffs' motion for summary judgment on the third cause of action (declaratory relief as to the applicability of Section 314) (Aplt. App. 68) and in the Secretary's cross-motion for summary judgment (Aplt. App. 493). The district court entered an order granting summary judgment in favor of the Secretary on all issues on June 25, 2001 (Aplt. Attach. 1-30).

indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted); *Johns v. Stewart*, 57 F.3d 1544, 1555 (10th Cir. 1995).

Under the now familiar two-step analytical framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court, when reviewing an agency's construction of the statute which it administers, must ask two questions. First, has "Congress . . . directly spoken to the precise question at issue." *Id.* at 842; *Lamb*, 265 F.3d at 1050. If Congress has directly spoken to the very matter at issue, no construction of the statute is necessary because both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843; *see Johns*, 57 F.3d at 1555. If the court determines that Congress has not directly addressed the issue at hand, the court may not simply impose its own construction on the statute; rather, the court must then ask whether the "agency's answer is based on a permissible construction of the statute." *Id. Accord Lamb*, 265 F.3d at 1050.

Contrary to plaintiffs' argument (Br. 21), this case presents no opportunity for application of this Court's holding in *Ramah Navajo Chapter v. Lujan*, 112 F.3d

1455, 1462 (10th Cir. 1997), that the "canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes," because the language of 25 U.S.C. § 450j-1(b) is clear and unambiguous. *See Shoshone-Bannock*, 269 F.3d at 955 (declining to apply rule interpreting ambiguities in favor of Indians because "the phrase 'subject to the availability of appropriations' [in 25 U.S.C. § 450j-1(b)] is 'clear and unambiguous'"); *Oglala*, 194 F.3d at 1378 (same); *see also Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000) (declining to apply canon favoring Indians where statute was unambiguous), *aff'd* 122 S.Ct. 528 (2001). Thus, both this Court and the agency must give effect to Congress' unambiguously expressed intent. *Chevron*, 467 U.S. at 843.

**A. The ISDEA States In Clear, Unambiguous Language That The Secretary's Obligation To Fund CSC Is "Subject To The Availability of Appropriations."**

The Tribes argue that the district court "erroneously concluded that under § 450-j-1(b) funds were not 'available,'" based on its misinterpretation of the ISDEA. Aplt. Br. 22. It is plaintiffs, however, that misinterpret the statute. As discussed previously, in providing funds for a self-determination contract, the ISDEA requires the Secretary to provide direct program costs of not less than he would have

otherwise provided if IHS directly operated the contracted program (the Secretarial amount), as well as various overhead costs associated with operation of the program – *i.e.*, CSC. 25 U.S.C. § 450j-1(a)(1) & (2). However, the ISDEA expressly conditions the funding of self-determination contracts, including funding for CSC, on "the availability of appropriations." *Id.* at § 450j-1(b). During the FYs at issue, congressional appropriations fell far short of the contracting tribes' CSC requests. Thus, IHS could spend only as much money as Congress appropriated for that purpose.

Indeed, three appellate courts have held that § 450j-1(a)(2)'s requirement that there "shall be added to the [Secretarial amount] contract support costs," is qualified by the "notwithstanding any other provision" and "subject to the availability of appropriations" language of § 450j-1(b). *See Shoshone-Bannock*, 269 F.3d at 952; *Oglala*, 194 F.3d at 1378; *RNSB*, 87 F.3d at 1345. As the Ninth Circuit just recently explained in construing this very same provision, "[b]ecause of the express language subjecting provision of [ISDEA] funds to 'availability of appropriations,' and the clear statement that this limitation applies 'notwithstanding any other provision in this Act,' Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress

appropriates money to cover it." *Shoshone-Bannock*, 269 F.3d at 952 (footnotes omitted).

*Shoshone-Bannock* is virtually indistinguishable from the case at bar. In that case, just as here, the plaintiff tribes brought suit against the Secretary alleging both a statutory and contractual entitlement to full CSC funding for new or expanded self-determination contracts in FY 1996. The district court had agreed with the tribes' arguments and ordered that IHS pay plaintiffs additional CSC funding.<sup>13</sup> The Ninth Circuit reversed, holding, as noted above, that the language of § 450j-1(b) is "express" and "clear." 269 F.3d at 952. The appeals court therefore concluded that "the only substantial issue in the case [was] whether Congress did or did not appropriate the money." *Id.* After examining the language of the 1996 appropriations act and the House Appropriations Committee Report, the Ninth Circuit reasoned that "\$7.5 million was all [Congress] wanted to spend" on CSC for new and expanded contracts. *Id.* at 954. The court therefore held that in light of "the statutory language subjecting contract support costs to 'availability of appropriations,' and saying that this limitation applies '[n]otwithstanding any other provision in this Act[,] . . . [t]here is simply no Indian Health Service obligation to fund contract

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<sup>13</sup>*Shoshone-Bannock Tribes v. Shalala*, 58 F.Supp. 2d 1191 (D. Ore. 1999), *rev'd sub nom. Shoshone Bannock Tribes v. Thompson*, 269 F.3d 948 (9th Cir. 2001).

support costs beyond the appropriations made available for that purpose." *Id.* (footnotes omitted).

The Federal Circuit reached the same conclusion in *Oglala*, where the court construed § 450j-1(b) in considering a different appropriation act with slightly different wording. *Oglala* involved a tribe's challenge to the Bureau of Indian Affairs ("BIA") method of handling a shortfall in CSC funding for FY 1995. Congress had appropriated a lump-sum of \$1.5 billion to BIA "of which not to exceed \$95,823,000" was to be used for payments of CSC." Based on the statutory cap, BIA implemented a plan to allocate the available CSC funds on a *pro rata* basis. Under BIA's policy, *Oglala* received only 91.74% of its CSC request. In reversing the IBCA's decision that the tribe was entitled to full CSC funding, the Federal Circuit declared that "[t]he language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are "subject to the availability of appropriations." 194 F.3d at 1378.

Explaining its reasoning, the Federal Circuit stated that "[t]he clause preceding this limitation, '[n]otwithstanding any other provision in this subchapter,' further clarifies that other statutory language in the ISDA relied upon by *Oglala* . . . cannot trump this express restriction on ISDA funding." *Id.* Thus, the court concluded, "in

the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program." *Id.* Moreover, the court held, Oglala's interpretation "would render the subject-to-appropriations language of § 450j-1(b) meaningless." *Id.*

The D.C. Circuit reached an analogous conclusion when it construed the "subject to the availability of appropriations" language in its decision in *RNSB*, which involved a challenge to BIA's handling of its shortfall CSC funding for FY 1995. The court opined that Congress "clearly" included the "subject to availability of appropriations" proviso of § 450j-1(b) "to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act." 87 F.3d at 1345. Hence, "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds." *Id.*

Although the decisions in *Oglala* and *RNSB* involved another agency and different appropriations with different wording, those decisions strongly support the Secretary's position that plaintiffs never had an unconditional right to full CSC funding because both the statute and the Tribes' contracts with IHS made the funding subject-to-the-availability-of-appropriations. Indeed, the Ninth Circuit in *Shoshone-Bannock* found "no basis for departing from [its] two sister circuits that have reached the same conclusion." 269 F.3d at 954. Similarly, there is no basis here for this

Court to depart from the holdings of the Ninth, Federal, and D.C. Circuits.<sup>14</sup>

Contrary to the arguments of *amici* (Ramah Br. 20), this court's decision in *Ramah Navajo Chapter, supra*, does not dictate a different result. That case involved the issue of whether the BIA properly included state program funds in its calculation of the CSC direct cost base. Nowhere did that decision address the meaning of the "subject to the availability of appropriations" language of § 450j-1(b) and the propriety of adjusting CSC payments in response to Congress' refusal to appropriate sufficient funds. Rather, the Court, in construing other provisions of the ISDEA (§§ 450j-1(a)(2) and 450j-1(d)) not at issue in this case, held that BIA was liable for the CSC associated with a tribal organization's contracts with other state and local

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<sup>14</sup> Apparently finding no way to distinguish the appellate court decisions in *Shoshone-Bannock, Oglala* and *RNSB*, plaintiffs instead continue to heavily rely (*see, e.g.*, Br. 24 n.43) upon the now invalidated district court decision in *Shoshone-Bannock Tribes v. Shalala*, 58 F. Supp. 2d 1191(D. Ore. 1999), *rev'd sub. nom. Shoshone-Bannock Tribes v. Thompson*, 269 F.3d 948 (9th Cir.2001). Plaintiffs also cite the administrative decision in *Appeals of Alamo Navajo Sch. Bd. Inc. & Miccosukee Corp.*, IBCA Nos. 3463-3466, 3560-3562, 1997 WL 759441 (Dec. 4, 1997), *rev'd, Babbitt v. Miccosukee Corp.*, 217 F.3d 857 (Fed. Cir. 1999) (Table, text available in Westlaw, 1999 WL 989060) (companion case to *Oglala, supra*), where the Interior Board of Contracts Appeals held that BIA was liable for the total amount of indirect costs sought by the tribe, despite shortfalls in the total amounts appropriated, because BIA's function in providing indirect costs under the ISDEA is essentially "ministerial." However, the district court properly rejected plaintiffs' reliance on *Alamo* and similar administrative rulings, which have no precedential value, in light of § 450j-1(b)'s clear statutory command that "[n]otwithstanding any other provision in this [Act]," the payment of CSC is "subject to the availability of appropriations."

agencies as well as CSC associated with its self-determination contracts with the BIA. Significantly, the Court's ruling on that point has no continued viability in light of Congress' enactment of a provision in the 1999 appropriations act to specifically bar BIA from paying CSC associated with other agencies' contracts with tribes. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 114, 112 Stat. 2681-255.

**B. The Secretary Was Not Required To Re-program Funds From Programs Serving Non-Contracting Tribes In Order To Fund The Tribes' CSC Requests For Either New or Ongoing Contracted Programs.**

Relying on general principles of appropriations law, plaintiffs next insist that sufficient appropriations were "legally available" from IHS' lump-sum appropriation to pay the Tribes' CSC requests. *Aplt. Br.* 23-37. However, as the district court correctly found (*Aplt. Attach.* 26) , the ISDEA makes it clear that "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." 25 U.S.C. § 450j-1(b). *See also id.* at § 450j(i)(1) (directing the Secretary to "take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract"). Thus, the district court was correct in holding that plaintiffs are not entitled to additional CSC for either their newly-contracted programs or their

ongoing programs.

**1. New CSC.**

In light of the above statutory provisions, the Secretary, faced with limited appropriations that would not cover all program needs, had discretion to limit the amount of new CSC expenditures in accordance with the amount Congress had earmarked in committee reports and placed in the appropriations statute for that purpose (\$7.5 million), in accordance with IHS' priority list. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way") (citations omitted). Indeed, an agency's allocation of a lump-sum appropriation "requires 'a complicated balancing of a number of factors which are peculiarly within its expertise,'" such as whether funds are best spent on one program or another. *Id.* at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

Nevertheless, while an agency has considerable discretion in allocating a lump-sum appropriation, "an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." *Lincoln*, 508 U.S. at 193. In this case, however, Congress has not restricted IHS' allocation of its lump-sum

appropriation by requiring full immediate funding of CSC claims.

Although the ISDEA requires that CSC "shall be added to" the Secretarial amount, § 450j-1(a)(2), the Act also makes clear that "[n]otwithstanding any other provision" in the Act, the Secretary's obligation to fund self-determination contracts, including CSC, "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." 25 U.S.C. § 450j-1(b). *See also id.* at § 450j(g) (Secretary is prohibited from making "any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals").

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.

In light of these competing claims and chronic appropriations shortfalls, the Secretary decided to follow Congress' recommendation in the committee reports as

to how much Congress believed IHS should spend on new CSC.<sup>15</sup> Allocating new CSC requests in accordance with IHS' priority list is an orderly and equitable way to distribute the agency's limited resources, without reducing funding to other tribes or programs. Because the Secretary's solution is reasonable, and is consistent with IHS' responsibilities under the ISDEA, it should be upheld.<sup>16</sup>

## **2. Ongoing CSC Funding.**

Plaintiffs argue (Br. 23-33) that there was no limit on the availability of appropriations to pay CSC for ongoing (or existing) contracts because: (1) funds were

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<sup>15</sup> Plaintiffs belabor the argument (Br. 34-37) that the "shall remain available" language used in the 1996 and 1997 appropriations acts did not establish a true statutory cap and that, therefore, IHS was not required to follow recommendations in the committee reports that only \$7.5 million be spent on new CSC. But while indicia in committee reports and other legislative history do not establish any legal requirements on an agency, it would be unwise for an agency to ignore such recommendations. As the Supreme Court observed in *Lincoln*, "we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences." 508 U.S. at 193.

<sup>16</sup> Moreover, plaintiffs do not dispute that the \$7.5 million for new CSC has been spent (*see* Br. 52), nor they do challenge the order of their placements on the queue. In *Shoshone-Bannock*, the district court granted summary judgment to plaintiffs on the theory that unless IHS proved that paying the tribes' full CSC request would reduce availability of funds to other tribes, IHS had to use its general FY 1996 \$1.7 billion appropriation, not just the \$7.5 million, to cover CSC. The Ninth Circuit dismissed this notion, stating that it made no difference that IHS did not submit any evidence showing that paying more to plaintiffs would reduce the availability of money to other tribes because, "[i]t is undisputed that there is nothing left of the \$7.5 million. . . . The \$7.5 million is all gone, so it does not matter whether funding for other tribes would be reduced by allowing more [CSC] in this case." 269 F.3d at 955.

"legally available" to IHS from IHS lump-sum appropriation, and (2) the 1996 and 1997 congressional earmarks did not limit funding for ongoing CSC. However, these arguments fail for the same reasons that plaintiffs contentions regarding the availability of appropriations for new CSC floundered. As the district court concluded (Aplt. Attach. 5, 25), there were the same limitations on funding for ongoing CSC as on funding for new CSC – that is, a finite appropriation with competing mandatory claims for the funding.

Here, the district court specifically found that requiring IHS to pay the Tribes' additional CSC would impair "its ability to discharge its responsibilities with respect to other tribes and individual Indians." Aplt. Attach. 25. In support of its ruling, the district court pointed out that (*Id.*):

IHS' total appropriations from Congress for "Indian Health Services" in fiscal years 1996 and 1997 was \$1,747,842,000 and \$1,806,260,000 respectively. Most of IHS' annual appropriations are distributed to area offices for the payment of recurring costs. Recurring costs occur automatically from year to year and must be funded without reduction. In fiscal years 1996 and 1997, respectively, IHS allocated \$1,313,990,083 and \$1,368,893,059 in recurring costs to area offices. The remainder of the total annual lump-sum appropriated to IHS is retained each year by headquarters for activities that it manages. All of the money reserved for fiscal years 1996 and 1997 was spent leaving a zero balance at the end of those fiscal years. For fiscal years 1996 and 1997, Congress earmarked in appropriation committee reports, \$153,040,000 in 1996 and \$160,660,000 in 1997 to be spent on existing contract support costs. These contract support funds were allocated to the area offices for tribal contracts and compacts for fiscal years 1996

and 1997.

Although plaintiffs assert (Br. 31-32) that there is no support for the district court's findings in this regard, the court's conclusion are clearly supported by the declaration of Carl L. Fitzpatrick, Director of IHS' Division of Financial Management, with supporting budget information. *See* Fitzpatrick Decl. ¶¶ 10-15, 17-19 & Exs. E-I (Aplt. App. 530-33, 534-35, 540-69).

Nor is there is any merit to plaintiffs' unsupported arguments (Br. 26, 33, 49) that CSC payments for ongoing contracts become due at the beginning of a FY – ahead of all of IHS' other obligations – and thus it is irrelevant that IHS has no money left at the end of the year. For one thing, the payment provisions of the model contract do not distinguish between program and CSC funding. *See* § 450l(c) (Model agreement, sec. 1 at ¶ (b)(6)). Moreover, as we have discussed, IHS' responsibility to fund other programs and activities from its lump-sum appropriation are equally mandatory, not discretionary.

This Court should also reject plaintiffs' novel "plain meaning" construction of the "subject to the availability of appropriations" proviso as it relates to funding of ongoing contracts – *i.e.*, that it was intended by Congress to prevent IHS from interpreting the ISDEA as an opened-ended appropriation, or as encouraging IHS to violate the Anti-Deficiency Act (31 U.S.C. § 1341(a)(1)(A)). *See* Aplt Br. 27.

Plaintiffs ignore that the ISDEA was originally enacted in 1975 without the proviso, and the Secretary administered its funding provisions in the intervening thirteen years without violating the Anti-Deficiency Act. In any event, as discussed previously, three circuit courts have held that the clear and unambiguous meaning of the clause is to limit the Secretary's liability for CSC (and other contract funding) to available appropriations.<sup>17</sup> *Shoshone-Bannock, Oglala, RNSB, supra*.

Plaintiffs cite (Br. 28) *RNSB*, for the proposition that IHS has no discretion in CSC funding decisions.<sup>18</sup> In that case, the D.C. Circuit stated that "an insufficient

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<sup>17</sup> To the extent that plaintiffs argue that the § 450j-1(b) proviso relates to the timing of payment, as opposed to IHS' liability, the model agreement states that the amount of funding under the contract is "subject to the availability of appropriations," while timing of payment is treated separately. *See* §450l(c) (Model agreement, sec. 1 at ¶¶(b)(4) & (6)).

<sup>18</sup>Throughout their briefs, plaintiffs and *amici* also cite snippets of legislative history which they claim show congressional concern with "agency malfeasance" historically, and demonstrate that Congress intended to tightly restrict IHS' discretion in funding decisions. *See, e.g.*, Aplt. Br. 5-7,28; Ramah Amicus Br. 2, 4 n.4. A resort to legislative history is unnecessary, however, because as three circuit courts of appeals have held, the "subject to the availability of appropriations" language in §450j-1(b) is unambiguous. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms") (internal quotation marks omitted); *Oglala*, 194 F.3d at 1378 (the general intent underlying the ISDEA cannot "trump the express language of the statute"). In any event, the legislative history shows that Congress sought to restrict the Secretary's discretion when Congress provided sufficient funds; it does not show that Congress sought to restrict its *own* authority to control the federal fisc by restricting appropriations, especially since the text of the Act and

(continued...)

appropriation fails to excuse an agency from its obligation to follow as closely as possible the allocation plan Congress designed in anticipation of *full* funding." 87 F.3d at 1348. There, the appropriations act itself was silent on how to distribute the shortfall in CSC funding, and the D.C. Circuit relied on the legislative history to glean the intent of the 1995 Congress that a *pro rata* reduction was intended. *Id.* at 1348-49. In contrast here, neither the appropriations statutes nor the legislative history specifically address the problem of shortfalls. Rather, the legislative history demonstrates that Congress believed that only the amounts earmarked in appropriation committee reports should be made available for CSC.

Further, although *RNSB* held that BIA's proposed allocation method violated the ISDEA, the decision nevertheless accepts the premise that the funding of CSC under the Act is limited to the amount of available appropriations and that an agency is not required to dismantle other important health care programs to obtain additional funds to fully pay CSC. The court thus explained that "even though the ISDA speaks of a Tribe's 'entitlement' to certain funds, the Secretary cannot be forced to take money from a program serving a Tribe (for example, from the federally-funded 'programs' for which [CSC] is to cover administrative costs) in order to make up for

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<sup>18</sup>(...continued)  
model contract show that Congress preserved that latter power.

a [CSC] appropriations shortfall." 87 F.3d at 1345. In other words, § 450j-1(b) "mean[s] precisely what it says," the Secretary need only distribute the amount of money appropriated by Congress, "*and need not take money intended to serve non-[CSC] purposes under the ISDA in order to meet his responsibility to allocate [CSC].*" *Id.* (emphasis added).

Finally, plaintiffs' assertion (Br. 38 n.61) that "[t]he 'reduction clause' defense is nothing but a *post hoc* rationalization for actions that patently violated the Tribes' rights," is itself patently baseless. The evidence shows that IHS did its budget execution for all categories, not just CSC, at the beginning of the year. *See* Fitzpatrick Decl. ¶ 4 & Ex. F (Aplt. App. 528, 540-543).

## **II. THE TRIBES HAVE NO CONTRACTUAL RIGHT TO FUNDING OF CSC BEYOND AVAILABLE APPROPRIATIONS.**

The district court rejected plaintiffs' contention that they have a contractual right to additional CSC funding based on its conclusion that "the contracts at issue are conditioned on the IHS having sufficient funding." Aplt. Attach. 23. The district court's ruling is correct and thus should be upheld by this Court. The ISDEA requires that "[e]ach self-determination contract entered into under the [Act] shall . . . contain,

or incorporate by reference, the provisions of the model agreement described in [§ 450l(c) of the Act.]" 25 U.S.C. § 450l(a). The model agreement states with respect to funding: "*Subject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement [negotiated by the parties]." *Id.* at § 450l(c)(Model agreement, sec. 1 at ¶(b)(4)) (emphasis added).

When Cherokee entered into its compact with the government, the Tribe agreed to the statutory limitations described in § 450l(c). *See Compact of Self-Governance Between the United States of America and the Cherokee Nation*, art. IV, sec. 3 (June 30, 1993) (Aplt. App. 425) (Secretary shall provide funding "[s]ubject only to the appropriation of funds by the Congress of the United States . . ."). Cherokee's FY 1997 AFA also contained language specifically stating that "[t]he parties agree that adjustments may be appropriate due to unanticipated Congressional action." FY 1997 AFA Between the United States of America and Cherokee Nation, sec. 10 (Aplt. App. 450). IHS' contractual obligation to fund Cherokee's new CSC request was therefore contingent on the availability of appropriations, and the Tribes' request was placed on IHS' priority list in accordance with agency policy.

Likewise, Shoshone's compact and AFAs with the government contained the mandatory statutory language conditioning funding on the availability of

congressional appropriations. *See Compact of Self-Governance Between the Duck Valley Shoshone-Paiute Tribes and the United States of America*, art. II, sec. 3 (Oct. 1, 1994, as amended Oct. 1, 1995) (Aplt. App. 302); Shoshone's FY 1996 AFA (Aplt. App. 342) ("the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts . . ."); Shoshone's FY 1997 AFA (Aplt. App. 374) ("the total amount of funding in this Agreement is subject to the availability of appropriations"). IHS' contractual obligation to Shoshone was thus conditioned on the availability of appropriations. Like Cherokee, Shoshone's new CSC request was placed on the ISD queue.

IHS distributed the \$7.5 million ISD Fund each of the FYs at issue here on a first-come, first-served priority basis. Each tribal request for CSC for new or expanded contracts was placed on the priority list and paid according to its place on the list until the \$7.5 million for the FY was exhausted. When new ISD funds became available the next FY, IHS was able to continue to pay CSC to tribes with outstanding requests on the queue until that FY's ISD funds were also exhausted. Because the Tribes' CSC requests for FYs 1996 and 1997 were too far down on the priority list, Cherokee and Shoshone did not receive additional CSC for their new programs.

Thus, the Tribes cannot claim any contractual right to funding of its CSC beyond available appropriations. In rejecting the same argument made by the

plaintiff tribe in *Shoshone-Bannock*, the Ninth Circuit declared: "But the language in its contract expressly precludes an independent claim on that basis. It says that the Secretary's obligation is 'subject to the availability of appropriations.'" 269 F.3d at 952. Thus, "[a]ny contractual claim that the tribe might make is vitiated by the fact that none of the \$7.5 million was available at any relevant time." *Id.* at 955. Further, any expectation by Cherokee and Shoshone to receive full CSC funding here was not reasonable. *See Oglala*, 194 F.3d at 1380 (tribe's expectation to receive full CSC funding was not reasonable in light of the subject-to-availability-of-appropriations language in § 450j-1(b) and in the model contract, § 450l(c)). Moreover, plaintiffs contracted with knowledge of the historical under-funding of CSC by Congress, and that the queue was IHS' mechanism for dealing with those shortfalls.

**III. SECTION 314 CONFIRMS THAT THE SECRETARY'S AUTHORITY UNDER THE ISDEA TO OBLIGATE FUNDS FOR NEW CSC CLAIMS IS LIMITED TO THE AMOUNTS APPROPRIATED OR EARMARKED BY CONGRESS FOR SUCH PURPOSES.**

As discussed previously, in addition to the clear restriction on funding already contained in § 450j-1(b), Congress enacted a further restriction on spending under the ISDEA in Section 314. Specifically, Section 314 makes clear that "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for . . . the [IHS] . . . for payments to tribes . . . for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with . . . the [IHS] . . ., *are the total amounts available for fiscal years 1994 through 1998 for such purposes . . .*." Section 314 (emphasis added). In the FYs in question, Congress allocated to IHS \$7.5 million for payment of new CSC.

The district court therefore aptly found "that the plain language of section 314 caps the amount the government can spend on new contract support costs to \$7.5 million." Aplt. Attach. 27. Indeed, that is the same conclusion reached by the Ninth Circuit in *Shoshone-Bannock*, the only appellate court to have construed Section 314. The court of appeals stated that "[Section] 314 is unambiguous. Congress plainly said that the appropriated amounts were the total amounts available." *Shoshone-*

*Bannock*, 269 F.3d at 955.

As tribes assumed greater responsibility for operating health care programs in the 1990s, their requests for CSC correspondingly escalated. *See, e.g.*, S. Rep. No. 105-227, at 51-52 (1998) (expressing concern over escalating CSC requests). Not surprisingly, litigation over CSC, like the instant case, also increased. Section 314 was enacted in the wake of a series of judicial decisions which held IHS and the BIA liable for the full amount of CSC requested by the plaintiff tribes for new or expanded programs. *See* S. Rep. No. 105-227, at 52 (noting that the demand for CSC funding had increased and that "in several cases the Federal courts have held the United States liable for insufficient CSC funding"). These holdings<sup>19</sup> were contrary to Congress' intent that the total IHS funding for such new CSC be restricted to the \$7.5 million earmarked in the committee reports and appropriated in the appropriations statutes, and contrary to the statutory and contractual language which conditioned all self-determination contract funding on the availability of appropriations.

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<sup>19</sup> Two district courts had held that the \$7.5 million earmark was not a cap on available CSC, and that absent a showing of harm to other tribes, IHS must provide a tribes' request for full CSC funding. *See Shoshone-Bannock*, 58 F. Supp. 2d 1191, *rev'd*, 269 F.3d at 948; *CRIHB, supra*; *cf. Miccosukee, supra* (IBCA held that tribe was entitled to money damages totaling 100% of its new CSC despite express statutory cap on CSC contained in BIA appropriation for FY 1994), *rev'd, Babbitt v. Miccosukee Corp.*, 217 F.3d 857 (Fed. Cir. 1999) (Table, text available in Westlaw, 1999 WL 989060).

Section 314 was directed at these decisions and expressly limited the availability of CSC funding for new and expanded self-determination contracts to total amounts which could not exceed \$7.5 million. *See* S. Rep. No. 105-227, at 91-92 (1998) (acknowledging that several courts had held the United States liable for insufficient contract support cost funding, and expressing "concern[] about continuing and growing funding shortfalls in contract support costs"). Congress directed IHS, in cooperation with the Tribes, to develop a proposal for the equitable distribution of contract support for the year 2000. 144 Cong. Rec. H11044, H11382 (daily ed. Oct. 19, 1998). However, Congress underscored its intent that funding for CSC be limited and should not be obtained by depriving programs of their operational funding (*e.g.*, base funding of self-determination contracts and funding for direct health service programs that had not been the subject of self-determination contracting by Tribes), stating that "[t]he remedy cannot be a large infusion of additional funding for contract support costs at the expense of either critical health programs or critical construction needs of the Service." *Id.* at H11382.

Section 314, by its plain terms, unequivocally prohibits IHS from disbursing more than a maximum total of \$7.5 million each year to tribes for CSC for their new and expanded programs from 1994 through 1998. It indicates that the amount earmarked in committee reports for Public Laws 104-134 and 104-208, *i.e.*,

"\$7,500,000 . . . for the transitional costs of initial or expanded tribal contracts" in 1996 and 1997, respectively, shall be "*the total amounts* available" for those years "for such purposes." Section 314 (emphasis added); Pub. L. No. 104-134, 110 Stat. at 1321-189; Pub. L. No. 104-208, 110 Stat. at 3009-213. This restriction applies "notwithstanding any other provision of law." Section 314. In other words, it supersedes *any* provision in the ISDEA that allegedly requires IHS to pay contracting tribes more than a total of \$7.5 million per year for new CSC. *See United States v. Gonzales*, 520 U.S. 1, 4 (1997) (The word "'any' has an expansive meaning" and "must be read . . . as referring to all"); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) (The word "'any' means all"). By the same token, Section 314 similarly prohibits IHS from paying CSC above the \$153 million and \$160 million earmarked in committee reports in FYs 1996 and 1997 respectively for ongoing self-determination contracts.

Furthermore, the concept of "availability" in Section 314 is consistent with the language of the ISDEA itself, which repeatedly states throughout that funding under the Act is "subject to the availability of appropriations." 25 U.S.C. §§ 450j-1(b), 450j(c); *see also id.* at 450l(c) (Model agreement, sec. 1 at ¶(b)(4)). Section 314 unmistakably dictates that the \$7.5 million annual allotments set forth in the committee reports, whether already spent or not as of 1998 (when Section 314 was

enacted), "are the total amounts available" for such purposes (*i.e.*, new CSC funding) each year in question. Similarly, the amounts earmarked to fund CSC for existing contracts (\$153 million in FY 1996 and \$160 million in FY 1997) are the total amounts available for that purpose. Thus, the Act conditions the amount of funding under self-determination contracts upon "the availability of appropriations," and Section 314 defines what amounts of appropriations "are available."<sup>20</sup>

There is no merit to plaintiffs' argument (Br. 50-51) that Section 314 restricts only IHS' expenditure of unobligated balances.<sup>21</sup> Such a construction is linguistically illogical. If Congress had simply meant to bar the expenditure of unspent funds, it

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<sup>20</sup> Moreover, Congress' simultaneous enactment in the 1999 Appropriations Act of a moratorium on new or expanded self-determination contracts or compacts reinforces the point that Congress intended to contain CSC claims. *See* Pub. L. No. 105-277, § 328, 112 Stat. 2681-291 ("none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the [ISDEA]. . .").

<sup>21</sup> Plaintiffs contend for the first time on appeal (Br. 13-14 & n.27) that IHS budget requests to Congress showed substantial unobligated balances of \$76 million and \$90 million for FYs 1996 and 1997, respectively, and attempts to introduce new evidence not presented in district court in support of this argument. This Court should therefore refuse to consider plaintiffs' argument and evidence. In any event, as IHS' Director of Financial Management declared under penalty of perjury, "IHS obligated all of the funds that Congress provided in its lump sum appropriation for those years with the exception of some minor unobligated funds." Fitzpatrick Decl. ¶ 3 (Aplt. App. 527-28). Plaintiffs could have challenged IHS' evidence in district court, but failed to do so, thereby depriving IHS of the opportunity to specifically address their points. Thus, this court should not give them the opportunity to do so on appeal.

could have said so directly. As the *Shoshone-Bannock* court stated in rejecting the same argument made by the tribes in that case, "Congress plainly said that the appropriated amounts were the total amounts available. Congress did not say that it meant only to restrict the Secretary's authority to unobligated balances." 269 F.3d at 955-56.

Indeed, given its knowledge of the litigation involving the shortfalls in CSC funding, Congress was presumably aware that IHS had already exhausted the amounts earmarked in committee reports for its 1996 and 1997 CSC funding when it enacted Section 314 in October 1998. Thus, Section 314 would have been superfluous if it were intended to target unspent prior funding. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage"). Because the language of "[Section] 314 is unambiguous," it thereby forecloses plaintiffs' claims. *Shoshone-Bannock*, 269 F.3d at 956; *see Chevron*, 467 U.S. at 842-45 (where Congress has directly spoken to the very matter at issue, no construction of the statute is necessary, for both the courts and the agency must give effect to congressional intent).

**A. The Tribes Had No "Vested Right" To Full Contract Support Funding.**

Plaintiffs also argue (Br. 54) that Section 314 cannot be applied to repudiate the Tribes' "vested" contractual rights. Relying principally on *United States v. Winstar Corp.*, 518 U.S. 839 (1996), plaintiffs argue that the government is liable in damages even when Congress, by statute, repudiates contractual obligations. However, no vested rights were repudiated by Section 314.

As discussed earlier, when the Tribes contracted with IHS, their right to payment was, under the terms of the contracts themselves and the terms of the authorizing statute, subject to the availability of appropriations. The ISDEA and the contract alike thus reserved to Congress the power to deny the Tribes of any payment by exercise of its right not to appropriate funds. Here, Congress has done no more than exercise that power, which it expressly reserved by statute and in the contract. *See Richmond*, 496 U.S. at 425 ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

For that reason, plaintiffs' reliance on *Winstar*, is misplaced.<sup>22</sup> In *Winstar*, the

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<sup>22</sup> Plaintiffs and *amici* also rely on *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 553 (Ct. Cl.1980), where the claims court held that the right to payment under a government contract, although conditional upon the availability of appropriations, nonetheless becomes a vested right at the time a payment fell due because "appropriated funds were available" at the time. Aplt. Br. 26 n.46; Ramah Amicus Br. 7-8. *Blackhawk* is distinguishable because it dealt with the interpretation (continued...)

Court accepted the plaintiff financial institutions' claim that "the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury." 518 U.S. at 871. Here, however, as the district court concluded (Aplt. Attach. 29):

[T]here is no evidence that the government intended to assume the risk if Congress failed to provide sufficient appropriations. In fact, after a review of the contracts into which plaintiffs entered, it appears as if plaintiffs assumed the risk of a shortfall.

Clearly, IHS' "ability . . . to bind the Government contractually was expressly conditioned on the availability of appropriations." *See Oglala*, 194 F.3d at 1379. Further, a tribe's obligation to administer a self-determination contract is also conditioned on the "availability of appropriations."<sup>23</sup> 25 U.S.C. § 450l(c) (Model

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<sup>22</sup>(...continued)

of a procurement contract, and self-determination contracts are not to be construed as procurement contracts. 25 U.S.C. § 450b(j). Moreover, *Blackhawk* supports the Secretary's position here, where "the Government's liability [i]s conditioned upon the continuing availability of appropriated funds to the *agency*. The risk perceived in this contingency having come about, the Government's liability, by the terms of the agreement, was thereby extinguished." *Blackhawk*, 622 F.2d at 553.

<sup>23</sup> *United States v. Larionoff*, 431 U.S. 864 (1977), is also inapposite. In that case, the relevant statute did not condition award of the re-enlistment bonuses at issue on the availability of appropriations. *See Shoshone-Bannock*, 269 F.3d at 956. In contrast, as we have discussed, provisions throughout the ISDEA condition funding of tribal contracts on such a contingency.

agreement, sec. 1 at ¶ (c)(3)).

Finally, Section 314 simply clarifies Congress' intent in the ISDEA.<sup>24</sup> As explained above, the Secretary was not required to fund CSC fully even before Section 314 was enacted, since doing so would have required her to take funds from existing programs. Because Section 314 merely clarifies Congress' intent, it does not deny the Tribes a fixed "right," since the Tribes never had a fixed right to have the statute read in a particular way. *See Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259 (9th Cir. 1997) (where Congress simply clarified the meaning of a statute in the midst of litigation over the statutory meaning, plaintiffs never had a fixed "right" to have the statute read their way), *cert. denied*, 525 U.S. 928 (1998); *cf. Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53 (1986) ("Congress reserved the authority not only to amend [the Social Security Act, 42 U.S.C.] § 418 but also Agreements entered into 'in conformity with' that section.").

## **B. Payment Of Plaintiff's Claims Would**

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<sup>24</sup> *Cf. Shoshone-Bannock*. The appeals court there held that Section 314 "eliminated retroactively" any ambiguity in the language of the 1996 appropriations act that \$7.5 million "shall remain available until expended." 269 F.3d 954. The court opined that "[o]nce Congress provided that \$7.5 million was the 'total amount [] available,' there could no longer be a serious question whether the remaining \$1.7 billion was also available for this purpose." *Id.* The court further noted that Congress may enact retroactive laws if it does so "expressly and clearly," and held that Section 314 is a clear expression of congressional intent. *Id.* at 955, 956 (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994)).

### Violate The Appropriations Clause.

The Constitution vests Congress, and Congress alone, with the power to direct the expenditure of funds from the Treasury. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *OPM v. Richmond*, 496 U.S. 414, 416 (1990) ("payments of money from the Federal Treasury are limited to those authorized by statute"). Adherence to this requirement "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428. Here, where Congress enacted a statute that specifies how appropriated money should be spent, and the statute declares that the Secretary is not required to *reduce* funding for other programs in order to fund ISDEA contracts, the Appropriations Clause bars the payment of any funds to the Tribes beyond that amount. The district court was therefore correct in relying on the Appropriations Clause as an additional ground for rejecting plaintiffs' claim of entitlement to additional CSC funding.

Plaintiffs argue (Br. 52), however, that the district court erred in relying on the Appropriations Clause because they are seeking "money damages" for breach of statutory and contractual obligations, and not injunctive relief. This argument is

specious. The Appropriations Clause "vests Congress with exclusive power over the federal purse," assuring that "Congress has absolute control of the moneys of the United States." *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (quotation omitted). Thus, officers of the United States are prohibited from making or authorizing an expenditure or obligation that exceeds amounts available in appropriations for that obligation. 31 U.S.C. § 1341(a)(1)(A) (A United States employee "may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"); *see also Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995) (31 U.S.C. § 1341(a)(1)(A) "makes it clear that an agency may not spend more money for a program than has been appropriated for that program"), *cert. denied*, 516 U.S. 820 (1995).

Congress could not have spoken more plainly in Section 314 – "[n]otwithstanding any other provision of law" the amounts appropriated for CSC payments are "the total amounts available" for such purposes in FYs 1994 through 1998. Because Congress limited its appropriations for the payment of new CSC to \$7.5 million for FYs 1996 and 1997, "[a]ny contractual claim that the tribe[s] might make is vitiated by the fact that none of the \$7.5 million was available at any relevant time." *Shoshone-Bannock*, 269 F.3d at 956.

**C. Plaintiffs Are Not Entitled to Full Contract Support Funding Under The Rule of *New York Airways*.**

Finally, plaintiffs argue that whether or not Congress appropriated sufficient funds for IHS to pay their CSC requests, the government "would remain liable on these contracts because the Secretary had unconditional 'contracting authority' to enter into them, and his failure to secure sufficient appropriations to pay is no excuse."<sup>25</sup> Aplt. Br. 54. The Tribes rely on *New York Airways, Inc. v. United States*, 369 F.2d 743 (Cl. Ct. 1966), in support of this argument. As the district court correctly held, however, cases like *New York Airways* have no application in this situation.

As the district court explained (Aplt. App. 26) (emphasis added):

In *New York Airways*, the government, as a contracting party, had an unqualified contractual obligation for which it had simply failed to appropriate money and pay. In the instant case, the agency's ability to bind the government contractually *was expressly conditioned by statute and contract on the availability of appropriations*. Further, the statute at issue in *New York Airways* provided the government should "make

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<sup>25</sup> There is no merit to plaintiffs' argument that Congress intended the Tribes to receive full CSC funding, but that IHS simply failed to request adequate funding to meet its alleged commitments. Although IHS' budget requests fell short of its actual needs in FYs 1996 and 1997 (because IHS' budget requests must be submitted two years before Congress appropriates the money, and in any event are reduced by HHS and the Office of Management and Budget before presentation to Congress), Congress nevertheless appropriated even *less* funding than IHS requested. Fitzpatrick Decl. ¶¶ 6-7 (Aplt. App. 529). Thus, it would have been futile for IHS to request even more funding.

payments out of appropriations," unlike the statute in this case which provides the government payments are "subject to the availability of appropriations."

The Federal Circuit in *Oglala* reached the same conclusion. 194 F.3d at 1379 ("Oglala's situation differs fundamentally in that the ability of Interior to bind the Government was expressly conditioned on the availability of appropriations.").

Furthermore, despite plaintiffs' suggestion to the contrary (Br. 53 n.83), Section 314 also bars payment of CSC to the Tribes from the Judgment Fund, 31 U.S.C. §1304. Section 314 states that "[n]otwithstanding any other provision of law," the amounts appropriated in the spending bills for fiscal years 1994-1998 are the total amounts available to fund CSC in those years. This sweeping language supports the Secretary's position that Congress intended that those amounts, and only those amounts, be available to fund CSC in those FYs. *See Illinois Nat'l Guard v. FLRA*,, 854 F.2d 1396, 1402 (D.C. Cir. 1988) ("notwithstanding' language of the statute really could not be clearer").

The Supreme Court has said that the Judgment Fund "does not create an all-purpose fund for judicial disbursement . . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432; *accord Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 95 (1992) (Rehnquist, C.J.) (for

the Court) (payment of a money judgment must be based "on a substantive right to compensation based on the express terms of a specific statute") (quoting *Richmond*, 496 U.S. at 432). Because the Tribes' right to CSC payments was *conditioned* on available appropriations, and because Section 314 eliminates any appropriation for CSC payments in excess of earmarked sums, there is no right to those payments under the terms of a specific statute within the meaning of *Richmond*. See 496 U.S. at 425 ("The difficulty in the way [of execution of a judgment against the United States] is the want of any appropriation by Congress to pay this claim") (citation omitted).<sup>26</sup>

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<sup>26</sup> None of the other cases cited by plaintiffs in support of their argument that relief is available under the Judgment Fund are dispositive. See, e.g., *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994); *Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied sub. nom. Raymark Indus. v. U.S.*, 491 U.S. 904 (1989). Unlike those cases, here the agency's authority to bind the government was expressly conditioned on the availability of appropriations. See *Oglala*, 194 F.3d at 1379. Further, 25 U.S.C. § 450m-1(a) gives district courts original jurisdiction over "any civil action or claim against *the appropriate Secretary*." (emphasis added). Plaintiffs have not pled a Tucker Act claim for damages against the *United States*, which – given the amount of money involved here – would have to be brought in the Court of Federal Claims. See 28 U.S.C. § 1346.

## CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment in favor of the Secretary should be affirmed by this Court.

Respectfully submitted,

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