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' OPENING BRIEF

Lloyd B. Miller
William R. Perry
Sonosky, Chambers, Sachse, Miller & Munson
900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501
Telephone: (907) 258-6377
Facsimile: (907) 272-8332

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Statement of Jurisdiction 1

Statement of Issues Presented 2

Statement of the Case 3

Statement of the Facts 4

A. The Indian Self-Determination Act 4

B. Events in FY1996 and FY1997 12

C. Sections 314 and 328 17

D. Facts Regarding Appellant Tribes 18

Summary of Argument 18

Standard of Review & Rules of Statutory Construction 19

I. Standard of Review 19

II. Rules of Statutory Construction 21

Argument 22

I. By Misinterpreting the ISDA, the Appropriations Acts, and the Evidence, the District Court Erroneously Concluded That Under § 450j-1(b) Funds Were Not "Availab[le]", and That Paying the Tribes Would Have Required Reducing Funds for Programs Serving Some Other Tribe 22

A. The ISDA Required That Full Contract Support Costs Be "Added" to the Tribes' FY1996 and FY1997 Agreements 22

B. Sufficient Appropriations were Legally Available for the Secretary to pay the Tribes' Contract Support Costs Associated with the "Ongoing" Portion of Their Contracts 23

1. Funds were legally available to IHS to pay the Tribes because IHS had an unrestricted lump-sum appropriation from which to do so 25

2. The district court erred in finding that in FY1996 and FY1997 congressional earmarks limited the legal availability of IHS's appropriations for "ongoing" contract support costs 30

3. The district court's observations concerning IHS's subsequent expenditures are irrelevant and unsupported 31

C. Sufficient Appropriations were Legally Available for the Secretary to pay the Tribes' Contract Support Costs Associated with Their "Initial or Expanded" Contracts 33

D. The "Reduction Clause" Does Not Excuse the Secretary's Obligation to Perform Under the Contracts 38

1. The district court's interpretation of the "reduction clause" defies its plain meaning 38

2. The government never proved – and never could prove – that paying contract support costs would have caused IHS to reduce funding "for programs * * * serving a tribe" 41

3. The district court's ruling on the "reduction clause" was error in the absence of discovery 44

II. Section 314 Cannot Wipe Out the Government's Liability for Unpaid Contract Support Costs 44

A. If given retroactive application, Section 314 is a breach of contractual and statutory rights, not a sovereign act 45

B. It is unnecessary to give § 314 a retroactive application 50

C. Section 314 does not bar the payment of money damages 52

III. Once IHS Executes a Contract Under the ISDA, It Is Duty-Bound to Seek Sufficient Appropriations, and Its Failure To Do So Does Not Relieve the Government of Liability 54

Conclusion 58

TABLE OF AUTHORITIES

Cases **Page**

Alder v. Wal-Mart Stores, Inc., 144 F.3d 664 (10th Cir. 1998) 43

Allen v. Muskogee, Okl., 119 F.3d 837 (10th Cir. 1997) 43

Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp., Nos. 3463-3466 and 3560-3562, 98-2 BCA ¶¶ 29,831 and 29,832, 1997 WL 759441 (IBCA Dec. 4, 1997) ("*Alamo*"), *appeal voluntarily dismissed in part sub nom. Babbitt v. Alamo*, 185 F.3d 880 (Fed. Cir. 1998) (unpub'd), *rev'd in part sub. nom Babbitt v. Miccosukee*, 217 F.3d 857 (Fed. Cir. 1999) (unpub'd), *cert. denied*, 530 U.S. 1203 (2000) 24, 33, 40

Appeals of Cherokee Nation, Nos. 3877-3879/98, 1999 WL 440045 (IBCA June 30, 1999) ("*Appeals of Cherokee I*"), *appeal dismissed sub nom. Shalala v. Cherokee Nation*, 232 F.3d 905, 2000 WL 290337 (Fed. Cir. 2000) (unpub'd), *on reconsid.*, *Appeals of Cherokee Nation*, 2001 WL 283245 (IBCA Mar. 21, 2001) ("*Appeals of Cherokee II*") . . . . *passim*

Arochem Corp. v. Coan, 176 F.3d 610 (2d Cir. 1999) 50

Babbitt v. Oglala, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000) 13, 56

Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994) 53, 58

Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980) 26

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 20

Chisom v. Roemer, 501 U.S. 380 (1991) 29

Church of Scientology of California v. Internal Revenue Service,
484 U.S. 9 (1987) 29

Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir. 2001) 4, 12, 17

District of Columbia v. Potomac Electric Power Co.,
402 A.2d 430 (D.C. App. 1979) 56

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 20

Ferris v. United States, 27 Ct. Cl. 542 (1892) 56

Gibney v. United States, 114 Ct. Cl. 38 (1949) 56

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 25

Horowitz v. United States, 267 U.S. 458 (1925) 48

INS v. St. Cyr, 121 S.Ct. 2271 (2001) 51

Javierre v. Central Altagracia, 217 U.S. 502 (1910) 20

Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000) 37

Kimberly Associates v. United States, 261 F.3d 864 (9th Cir. 2001) 47

Lamb v. Thompson, 265 F.3d 1038, 2001 WL 985547
(10th Cir. Aug. 21, 2001) 28

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 51

Lincoln v. Vigil, 508 U.S. 182 (1993) 31, 37

Lopez v. A.C.&S., Inc., 858 F.2d 712 (Fed. Cir. 1988) 53

*Mobil Oil Exploration and Producing Southeast Inc.
v. United States*, 530 U.S. 604 (2000) 47

Murray v. Charleston, 96 U.S. 432 (1877) 49

National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977) 54

Nebraska v. Wyoming, 507 U.S. 589 (1993) 20

New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 2, 55

Olenhouse v. Commodity Credit Corp, 42 F.3d 1560 (10th Cir. 1994) 38

Ortiz v. Norton, 254 F.3d 889 (10th Cir. 2001) 19, 41, 42

In re Overland Park Financial Corp., 236 F.3d 1246 (10th Cir. 2001) 21

Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828 (10th Cir. 1986) 44

Pueblo of Zuni v. United States, No. CIV01-1046LH/LFG (D. NM) 4, 13

Pueblo of Zuni v. United States, No. CIV00-00-0365LH/WWD (D. NM) 13

Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) ("*RNSB*") . . . . *passim*

Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) ("*RNC*") . . . . *passim*

Ramah Navajo Chapter v. Norton, No. CIV90-0957LH/WWD (D. NM) 13

Russello v. United States, 464 U.S. 16 (1983) 37, 55

S. A. Healy Co. v. United States, 576 F.2d 299 (Ct. Cl. 1978) 55

SEC v. Chenery Corp., 332 U.S. 194 (1947) 38

St. Charles Investment Co. v. Comm'r of Internal Revenue, 232 F.3d 773 (10th Cir. 2000) 21, 37

Shoshone-Bannock Tribes v. Shalala, 988 F.Supp. 1306 (D.Or. 1997) ("*Shoshone I*"), *modified*, *Shoshone-Bannock Tribes v. Shalala*, 999 F.Supp. 1395 (D.Or. 1998) ("*Shoshone II*"), *on remand*, *Shoshone-Bannock Tribes v. Shalala*, 58 F.Supp.2d 1191 (D.Or. 1999) ("*Shoshone III*"), *rev'd sub nom*, *Shoshone-Bannock Tribes v. Secretary, Dep't of Health and Human Services*, __ F.3d __, 2000 WL 33582652 (9th Cir. Oct. 16, 2001) ("*Shoshone IV*") . . . . . *passim*

Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers, 121 S.Ct. 675 (2001) 50

Train v. City of New York, 420 U.S. 35 (1975) 29, 54

True Oil Co. v. Comm'r of Internal Revenue, 170 F.3d 1294 (10th Cir. 1999) 29

United States v. Johnson, 529 U.S. 53 (2000) 28

United States v. Larionoff, 431 U.S. 864 (1977) 46

United States v. Locke, 529 U.S. 89 (2000) 40

United States v. Wilson, 503 U.S. 329 (1992) 50

United States v. Winstar, 518 U.S. 839 (1996) . . . . *passim*

United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 29

Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563 (1997) 53

Statutes

12 U.S.C. § 1464(t)(2)(a) 48
12 U.S.C. § 1464(t)(9)(A) 48
25 U.S.C. § 450 . . . . 1, 4
25 U.S.C. § 450-450n 7
25 U.S.C. § 450b(f) 11
25 U.S.C. § 450b(i) 5
25 U.S.C. § 450c 8
25 U.S.C.A. § 450f note (2000 Supp.) ("Title III") 7, 11, 21
25 U.S.C. § 450f(a) 6
25 U.S.C. § 450f(a)(1) 5, 18, 27, 54, 57, 59
25 U.S.C. § 450f(a)(2) 18
25 U.S.C. § 450f(b) 6
25 U.S.C. § 450f(e)(1) 6
25 U.S.C. § 450j-1(a) 18, 23, 27, 54
25 U.S.C. § 450j-1(a)(1) 8
25 U.S.C. § 450j-1(a)(2) 11
25 U.S.C. § 450j-1(a)(3) 11
25 U.S.C. § 450j-1(a)(3)(A)(i) 11
25 U.S.C. § 450j-1(a)(3)(A)(ii) 11
25 U.S.C. § 450j-1(a)(5) 11
25 U.S.C. § 450j-1(a)(6) 11
25 U.S.C. § 450j-1(b) . . . . *passim*
25 U.S.C. § 450j-1(b)(1) 11, 28, 42
25 U.S.C. § 450j-1(b)(2) 11, 28, 55
25 U.S.C. § 450j-1(b)(3) 11, 28
25 U.S.C. § 450j-1(b)(4) 11, 28
25 U.S.C. § 450j-1(d)(2) 11
25 U.S.C. § 450j-1(g) 18, 23, 27, 55
25 U.S.C.A. § 450k(a) (West 1983) 5
25 U.S.C. § 450k(a)(1) 7
25 U.S.C.A. § 450k(b) (1989 Supp.) 6
25 U.S.C.A. § 450k(c) (1989 Supp.) 6
25 U.S.C. § 450*l*(c) 7
25 U.S.C. § 450*l*(c) (sec. 1(a)(2)) 21
25 U.S.C. § 450*l*(c) (sec. 1(b)(4)) 23, 55

25 U.S.C. § 450*l*(c) (sec. 1(b)(11)) 14
25 U.S.C. § 450m-1 . . . . 44, 53
25 U.S.C. § 450m-1(a) 1
25 U.S.C. § 458aaa 7
25 U.S.C. § 458aaa-7(c) 11
25 U.S.C. § 1621 42
25 U.S.C. § 1621n 42
25 U.S.C. § 1621p 42
25 U.S.C. § 1621q 42
25 U.S.C. § 1621t(b) 42
25 U.S.C. § 1660(a) 42
25 U.S.C. § 1658 . . . . 55, 58
25 U.S.C. § 2008(g)(2) 58
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 1362 1
31 U.S.C. § 1304(a) 53
31 U.S.C. § 1341(a)(1)(A) 27
31 U.S.C. § 1341(a)(1)(B) 27
41 U.S.C. § 601 3

Pub. L. 100-472, 102 Stat. 2285 (1988) 7
Pub. L. 103-138, 107 Stat. 1379 (1993) 13
Pub. L. 103-413, 108 Stat. 4250 (1994) 6
Pub. L. 104-134, 110 Stat. 1321 (1996) 12, 35, 36, 37
Pub. L. 104-208, 110 Stat. 3009 (1996) 12, 13
Pub. L. 105-83, 111 Stat. 1 (1997) 13
Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) . . . . *passim*
Pub. L. 105-277, § 328, 112 Stat. 2681-291 (1998) 17, 57, 58
Pub. L. 106-31, 113 Stat. 59 (1999) 17
Pub. L. 106-113, 113 Stat. 1501 (1999) 51
Pub. L. 106-260, 114 Stat. 711 (2000) 7

Regulations

25 C.F.R. § 900.3(a)(5) 21

25 C.F.R. § 900.3(b)(8) 21

25 C.F.R. § 900.3(b)(11) 21

25 C.F.R. § 900.5 14

Rules

Fed.R.Civ.P. 23 4

Fed.R.Civ.P. 56 41

Fed.R.Civ.P. 56(c) 19

Fed.R.Civ.P. 56(f) 44

Legislative Materials

H.R. Conf. Rep. 104-259 (1995) 38

H.R. Conf. Rep. 105-337 (1997) 37

H.R. Rep. 104-173 (1995) 37

H.R. Rep. 105-609 (1998) 17, 57

S. Rep. 100-274 (1987), *reprinted in* 1988 U.S. Code Cong.
& Admin. News 2620 . . . . *passim*

S. Rep. 103-374 (1994) 7, 11

S. Rep. 104-125 (1995) 15, 38

S. Rep. 104-319 (1996) 15

134 Cong. Rec. H7366-04, 1988 WL 175429 (Sept. 9, 1988) 29

Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Comm. on Indian Affairs, 100th Cong., 1st Sess. (Sept. 21, 1987) 57

Comptroller General Opinions

Matter of Department of Education: *Recording of Obligation under the Guaranteed Student Loan Program*, 65 Comp. Gen. 4 (Oct. 2, 1985) 27

Matter of Forest Service–Appropriations for Firefighting Forest Fires, B-231711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989) 36

Matter of Thad Cochran, B-271607, 1996 WL 290140 (Comp. Gen. June 3, 1996) 36

Matter of The Hon. Jerry Lewis, B-287619, 2001 WL 761741 (Comp. Gen. July 5, 2001) 56

To the Chairman, House Comm. Merchant Marine and Fisheries, B-211190, 1983 WL 207412 (Comp. Gen. April 5, 1983) 54

Other Authorities

IHS Circular 2001-05 17

OMB Circular A-34 (2000) 25, 27, 33, 54

PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997) 14

PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998) 14

U.S. General Accounting Office, Report to Congressional Committees, INDIAN SELF-DETERMINATION ACT– SHORTFALLS IN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (1999) 9, 58

U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ("APPROPRIATIONS LAW") (*available on* Westlaw under "GAO REDBOOK") 25, 27, 30, 31, 54

Prior or Related Appeals

There are no prior or related appeals.

Under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* ("ISDA"), Congress directed the Secretary of Health and Human Services to execute contracts with Indian tribes to perform specific federal functions for a specific contract price. The Secretary, pursuant to this directive, executed contracts with the Appellant Tribes for FY1996 and FY1997 to operate certain Indian Health Service (IHS) programs for their people. The Secretary then refused to pay the Tribes the full amount due under their contracts, claiming that sufficient funds were not available. The Secretary did so even though Congress provided IHS with unrestricted appropriations, and did not impose any statutory cap on the payment of those contracts. In finding the Secretary's failure not to be a breach of contract, the district court misinterpreted and misapplied the ISDA and the relevant Appropriations Acts, and converted Appellants' binding contracts into discretionary grants to be paid at the Secretary's whim. Such a result is contrary to the ISDA.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 25 U.S.C. § 450m-1(a) and 28 U.S.C. §§ 1331 & 1362. This Court has jurisdiction pursuant to 28 U.S.C.

§ 1291 since this is an appeal from the district court's final Order entered June 25, 2001, dismissing the Complaint. Aplt. Att. 1. The Tribes' timely notice of appeal was filed August 3, 2001. Aplt. App. 745.

STATEMENT OF ISSUES PRESENTED

1. Whether sufficient appropriations were legally available in FY1996 and FY1997 to pay the Appellant Tribes' their full contract support costs associated with (a) the "ongoing" portion of their contracts with IHS, and (b) the "initial or expanded" portion of their contracts with IHS.

2. Whether the ISDA's "reduction clause" can be used by the Secretary as an after-the-fact rationalization for refusing to perform under the Tribes' contracts, given that Congress substantially increased IHS's lump-sum appropriation over the prior year.

3. Whether an appropriations rider, enacted years after-the-fact, could retroactively divest the Tribes of their rights to be fully paid under their contracts.

4. Whether under the doctrine of *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), an ISDA contract binds the United States to pay even where the agency fails to seek sufficient appropriations from Congress.

STATEMENT OF THE CASE

Appellants Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of Nevada ("the Tribes") entered into and fully performed certain ISDA contracts with the federal government in fiscal years 1996 (Shoshone-Paiute) and 1997 (both Tribes).

The contract price required to be paid by the ISDA and the Tribes' annual funding agreements at the beginning of each year included certain "contract support costs." The government did not fully pay those costs, either at the time or subsequently upon the presentation of administrative claims under the Contract Disputes Act, 41 U.S.C. § 601 *et seq*. ("CDA"). This lawsuit followed.

The Tribes filed their Complaint on March 5, 1999, seeking damages and declaratory relief against the United States, the Secretary, and the Director of the Indian Health Service. Dkt 1.

The district court on May 10 entered a pretrial order deferring discovery and other matters until disposition of initial dispositive motions. Aplt. App. 33. The Tribes then filed a motion for partial summary judgment of liability[1] and a motion for summary judgment seeking a declaration that an FY1999

[1] Aplt. App. 70.

appropriations rider did not impair their FY1996 and FY1997 rights.[2] The government cross-moved for summary judgment.[3] The district court on June 25, 2001 entered an Order denying the Tribes' motions, granting the government's motion, and dismissing the action. Aplt. App. 713.[4]

STATEMENT OF THE FACTS

A. The Indian Self-Determination Act[5]

1. History. To further "the policy of [tribal] self-determination"[6] and "tribal self-governance,"[7] Congress in the ISDA took the unprecedented step

---

[2] Aplt. App. 68.

[3] Aplt. App. 493.

[4] The Report on Planning Meeting and the district court's pretrial order scheduled class proceedings to follow the initial dispositive motions. Aplt. App. 26 & 33. While those motions were pending the court redirected the plaintiffs to file a motion for class certification, Dkt. 76, which the court subsequently denied, Dkt. 148. Since then, a new class action has been filed in the District of New Mexico raising many of the same issues. *Pueblo of Zuni v. United States*, No. CIV01-1046LH/LFG (filed Sept. 10, 2001). Due to this development, the Tribes no longer appeal the district court's Order denying class certification (although they continue to maintain that the Order seriously misstates the law and Rule 23).

[5] Pub. L. 93-638, *as amended*, 88 Stat. 2203 (1975), 25 U.S.C. § 450 *et seq.* ("ISDA").

[6] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) ("*RNC*").

[7] *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 995 (10th Cir. 2001).

of "direct[ing]" the Secretary[8] to contract over the daily operation of federal IHS programs to any tribe that elects to run those programs itself. *RNC*, 112 F.3d at 1456. The Act thus requires the Secretary to do the bureaucratically unthinkable: to divest himself not only of all authority to operate his own programs, but of all associated funding as well. Not surprisingly, for years IHS fiercely resisted this mandate.[9]

This "history of Congressional concern with agency malfeasance" led Congress in 1988 to enact a wide array of reforms, all of them in recognition that Congress's original broad delegation of authority to IHS to administer the Act had been a grave mistake.[10] *Shoshone I*, 988 F.Supp. at 1315-17. Congress curbed the

---

[8] 25 U.S.C. § 450f(a)(1). The Act applies to the Secretary of Health and Human Services (including IHS) and the Secretary of the Interior (including the Bureau of Indian Affairs ("BIA")). 25 U.S.C. § 450b(i).

[9] S. Rep. 100-274, at 6 (1987) ("There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources."). *See also Shoshone-Bannock Tribes v. Shalala,* 988 F.Supp. 1306, 1316-17 (D.Or. 1997) ("*Shoshone I*") (noting agency's "obvious conflict of interest"), *modified*, *Shoshone-Bannock Tribes v. Shalala*, 999 F.Supp. 1395 (D.Or. 1998) ("*Shoshone II*"), *on remand*, *Shoshone-Bannock Tribes v. Shalala*, 58 F.Supp.2d 1191 (D.Or. 1999) ("*Shoshone III*"), *rev'd sub nom*, *Shoshone-Bannock Tribes v. Secretary, Dep't of Health and Human Services*, __ F.3d __, 2000 WL 33582652 (9th Cir. Oct. 16, 2001) ("*Shoshone IV*").

[10] Originally Congress in 1975 delegated to the Secretary broad rulemaking authority, 25 U.S.C.A. § 450k(a) (West 1983). But "bureaucratic recalcitrance" posed the biggest obstacle to full realization of tribal self-determination, and despite the Act's mandates IHS pursued every possible avenue to frustrate Congress's intent. *Shoshone I*,

agency's authority in a multitude of ways, such as by repealing language suggesting agency discretion not to contract, limiting the reasons not to contract, and placing a heavy burden on the Secretary to justify decisions not to contract. 25 U.S.C. §§ 450f(a), (b), (e)(1). One by one, all of the abuses noted *supra* at 6 n.10, and more, were prohibited.

Next, Congress directed the Secretaries to work closely with tribes in formulating new regulations. 25 U.S.C.A. § 450k(b), (c) (1989 Supp.). But when IHS and the BIA failed to heed that mandate, Congress in 1994 enacted a raft of new amendments constraining the Secretarys' discretion even further.[11] These amendments revoked IHS's earlier general regulatory authority, and "[b]eyond the

---

988 F.Supp. at 1315-16.

According to the record Congress compiled, IHS (and the BIA) consistently refused to fully fund contracts; diverted funds due tribal contractors; misrepresented facts concerning indirect costs; imposed unpromulgated policies, rules and restrictions on tribes that impeded contracting; and erected a multitude of other obstacles to full realization of the Act's self-determination goals. *See* S. Rep. 100-274, at 7, 8, 10, 20-21, 30-31. The scorching 1987 Senate Report is a wholesale indictment of the Secretarys' failure to facilitate tribal self-determination, and forms the necessary backdrop for assessing the Secretary's actions here. *Shoshone I*, 988 F.Supp. at 1315-16 (discussing abuses leading to "massive amendments"). *See also RNC*, 112 F.3d at 1462, and *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1341, 1344-45 (D.C. Cir. 1996) ("*RNSB*") (both discussing agency failures).

[11] Pub. L. 103-413, §§ 101-106, 108 Stat. 4250-70 (1994) (codified throughout Title I); *RNC*, 112 F.3d at 1463 & n.7.

[16] areas specified in [§ 450k(a)(1)] . . . no further delegated authority [was] conferred." S. Rep. 103-374, at 14 (1994) (emph. added).[12] Further, Congress "prescrib[ed] the terms and conditions which must be used in any contract between an Indian tribe and [IHS or the BIA]," *id.* at 3, virtually eliminating IHS's discretion in contract negotiations. 25 U.S.C. § 450*l*(c) (model agreement).

In these and other ways, Congress "clearly expressed . . . its intent to circumscribe as tightly as possible the [Secretary's] discretion." *RNSB*, 87 F.3d at 1344. Indeed "[p]recisely because the Secretary had consistently failed to behave in a reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act." *Id.* at 1345 n.9.

2. Funding under the ISDA. Pursuant to the ISDA, IHS enters into self-determination contracts, self-governance compacts, and annual funding agreements with Indian tribes (collectively "contracts"),[13] whereby the tribe

[12] "Congress reinforced almost every section of the ISDEA, adopted a model self-determination contract . . . and stripped the Secretary of all her delegated rulemaking authority except for 16 narrow areas." *Shoshone I*, 988 F.Supp. at 1316.

[13] Self-determination contracts are entered into under the authority of Title I, 25 U.S.C. §§ 450-450n. Until August 2000, self-governance compacts were entered into under Title III, added by Pub. L. 100-472, § 209, 102 Stat. 2285, 2296 (1988) as amended, *formerly reproduced at* 25 U.S.C.A. § 450f note (2000 Supp.). Now, they are executed under Title V, added by Pub. L. 106-260, § 3, 114 Stat. 711, 712 (2000), 25 U.S.C. § 458aaa *et seq.*; *see also id.* § 10, 114 Stat. at 734 (repealing Title III).

undertakes to administer one or more designated federal health care programs serving it (such as an IHS hospital or clinic).

The ISDA provides that funding for services furnished to program beneficiaries will not be decreased when a tribe contracts to operate an IHS program. To begin, the ISDA requires that the contract amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs. . . . " 25 U.S.C. § 450j-1(a)(1) (the "Secretarial amount," *Shoshone I*, 988 F.Supp. at 1310).

This "Secretarial amount," however, does not reflect the full cost of carrying out IHS programs, because many of the administrative resources IHS draws upon when it runs a program are located in different government agencies (such as functions carried out by the Office of Personnel Management and the Treasury Department). In addition, IHS and various federal laws impose upon tribes additional burdens beyond those shouldered by IHS, such as requirements for program reporting and financial audits. *E.g.*, 25 U.S.C. § 450c.[14] Thus, even if tribal contractors receive the full "Secretarial amount" supporting a particular program, without additional funding tribes are compelled to reduce services to

[14] S. Rep. 100-274, at 9.

cover these unfunded responsibilities – with the Indian beneficiaries ultimately penalized by a tribe's decision to operate an IHS program.[15]

To offset this 'contract penalty,' IHS has for years paid tribal contractors some form of additional contract administration funding – called "contract support costs" ("CSC"). But historically, CSC payment amounts proved woefully inadequate to meet contract requirements, and as the Senate Indian Affairs Committee in 1987 observed, "[t]he consistent failure of federal agencies to fully fund tribal indirect costs[[16]] . . . resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements." S. Rep. 100-274, at 8.[17] Underfunding these costs typically compelled tribes to divert funds from already underfunded IHS services, just to make up the difference. *Id*. at 12-13; GAO REPORT at 40-43.

---

[15] U.S. General Accounting Office, Report to Congressional Committees, INDIAN SELF-DETERMINATION ACT – SHORTFALLS IN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (1999) ("GAO REPORT") at 38-43.

[16] "Contract support costs" encompass "indirect costs." *RNC*, 112 F.3d at 1461 & n.6.

[17] *See also* GAO REPORT at 39-40.

So grave was this problem that "one of [Congress's] primary concerns . . . in enacting the [1988] amendments was the chronic underfunding of tribal indirect costs." *RNC*, 112 F.3d at 1462. As this Circuit's citations in *RNC* reflect, the Senate Committee flatly declared that:

> Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

S. Rep. 100-274, at 13, adding that:

> [T]he single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.

Id. at 8.[18] The Senate decried the "financial management problems" suffered by tribes due to the "systematic[ ] violat[ion]" of self-determination contractor's rights "particularly in the area of funding indirect costs," *id*. at 8, 37, and it commanded IHS to "cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12.

[18] *RNC*, 112 F.3d at 1457 (quoting same).

Congress then amended the Act to require that each contract amount include "contract support costs," in addition to the "Secretarial amount." 25 U.S.C. §§ 450j-1(a)(2) & (5). Simultaneously, Congress outlawed a raft of past agency schemes for reducing the amounts owed to tribes. §§ 450j-1(b)(1) - (4); S. Rep. 100-274, at 12-13. In 1994 Congress strengthened these provisions further, emphasizing that contract support costs must include "both funds required for administrative and other overhead expenses and 'direct' type expenses of program operation."[19] 25 U.S.C. §§ 450j-1(a)(2), (3), (5) & (6).[20]

3. The § 450j-1(b) savings clauses. This case largely turns on the proper interpretation of the two savings clauses contained in § 450j-1(b), the "availability" clause and the "reduction" clause. The "availability" clause limits

---

[19] S. Rep. 103-374, at 8-9 (explaining 25 U.S.C. §§ 450j-1(a)(3), (5) & (6)).

[20] *See also* Title III, § 303(a)(6); 25 U.S.C. § 458aaa-7(c) (Title V). Contract support costs include:

> (1) pooled "indirect costs" that benefit all tribal operations, *see* 25 U.S.C. §§ 450b(f); 450j-1(a)(3)(A)(ii); 450j-1(d)(2); *RNC*, 112 F.3d at 1457-58; and
>
> (2) certain additional unpooled costs such as workers compensation insurance, *see* 25 U.S.C. § 450j-1(a)(3)(A)(i).

IHS calculates indirect costs pursuant to the same illegal methodology struck down by this Court in *RNC*, 112 F.3d at 1463. This brief does not address that issue, however, because the district court's ruling below forecloses any damage recovery at all.

the Secretary's duty to provide contract funding to the "availability of appropriations." *Citizen Potawatomi*, 248 F.3d at 1001. The reduction clause provides that the Secretary need not reduce funding for a program serving a tribe to make funds available to a contracting tribe.

B. Events in FY1996 and FY1997

1. The Appropriations Acts. For FY1996 and FY1997, Congress appropriated to IHS large, unrestricted lump-sum appropriations "to carry out the [ISDA]" and other specified laws. The appropriations totaled approximately $1.748 billion in FY1996,[21] and $1.806 billion in FY1997.[22]

Of the FY1996 appropriation, approximately $1.374 billion was unrestricted (including $35,781,000 in new funds over the prior year's funding level), with the balance designated by Congress for specific purposes.[23] Of the FY1997 appropriation, approximately $1.426 billion was unrestricted (including

---

[21] Pub. L. 104-134, 110 Stat. 1321-189 (1996).

[22] Pub. L. 104-208, 110 Stat. 3009-212 (1996).

[23] *Shoshone II*, 999 F.Supp. at 1397 (calculating increase over prior year). The amount of the unrestricted lump-sum appropriation can be determined each year by deducting all funds specifically set aside for designated purposes. In fiscal year 1996 the total "Indian Health Services" appropriation was $1,747,842,000 billion, of which $1,373,972,000 (including the $7.5 million ISD Fund) was unrestricted. The remainder separately identified $12 million for catastrophic health needs, $350,564,000 for contract medical care, and $11,306,000 for IHS's loan repayment program. 110 Stat. 1321-189.

$52,266,000 in new funds over the FY1996 funding level).[24] In addition, in both appropriations Acts, Congress designated an "Indian Self-Determination Fund" ("ISD Fund"), stating that:

> $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with [IHS] under the provisions of the [ISDA].[25]

Neither Act limited the amount of CSCs IHS could pay to a "not to exceed" sum.[26]

---

[24] In FY1997 the total "Indian Health Services" appropriation was approximately $1.806 billion, of which $1,426,238,000 was unrestricted (including the $7.5 million ISD Fund) (*i.e.*, $1,806,269,000 less a combined $380 million designated for specific purposes). 110 Stat. 3009-212.

[25] *Supra* 12 nn.21 & 22.

[26] Congress in FY1998 began limiting the availability of the appropriations IHS could disburse for contract support costs to "not to exceed" a certain sum. *E.g.*, Pub. L. 105-83, 111 Stat. 1, 41 (1997). (Congress began capping the BIA's CSC appropriation earlier, in FY1994, *see* Pub. L. 103-138, 107 Stat. 1379, 1391 (1993)). Both agencies' appropriations are contained in the same appropriation bill.

Whether a "not to exceed" provision has any effect on the government's liability for failing to pay the full CSC amounts obligated in a given year is not at issue in this appeal (which only concerns the Tribes' contracts in FY1996 and FY1997). This feature distinguishes this case from *Babbitt v. Oglala*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000), which involved the BIA's FY1995 CSC payments (a year in which the Appropriations Act did have a "not to exceed" cap on the BIA's CSC payments). The "not to exceed" issue is, however, involved in other pending litigation within this Circuit. *See Ramah Navajo Chapter v. Norton*, No. CIV90-0957LH/WWD (D. NM); *Pueblo of Zuni v. United States*, No. CIV00-0365LH/WWD (D. NM); *Pueblo of Zuni v. United States*, No. CIV01-1046LH/LFG (D. NM).

At the end of both years, IHS recorded substantial unobligated balances of $76 million (FY1996) and $90 million (FY1997).[27]

2. IHS's CSC policy. In allocating CSCs for 1996 and 1997, IHS considered two separate categories of tribal contracts: "existing" contracts and "initial or expanded" contracts.[28]

"Existing" contracts were contracts that a tribe had been operating in a previous year. For example, if a tribe was operating an IHS clinic and had been receiving its IHS funding (including CSCs) since 1990, that contract in 1996 was an "existing" contract.

"Initial or expanded" contracts, as the name suggests, addressed IHS programs that were never operated by a tribe in prior years.[29] So, if a tribe

---

[27] *See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget Appendix at 500 (ident. code 24.40) (reporting $76 million as the FY1996 "actual" "end of year" "unobligated balance"); PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget Appendix at 404 (reporting $98 million as the FY 1997 "actual" "end of year" "unobligated balance").

[28] IHS in FY1996 calculated and paid contract support costs through an unpublished and non-binding internal policy. Aplt. App. 199. *But see* 25 U.S.C. § 450*l*(c) (sec. 1(b)(11)) and 25 C.F.R. § 900.5 (unpublished requirements are not binding); *see also RNSB*, 87 F.3d at 1350 (noting "the ISDA's absolute ban on the imposition of [nonregulatory requirements]"). A successor policy was used in FY1997. Aplt. App. 208.

[29] IHS used the terms "initial" and "new" interchangeably. The Appropriations Acts use the term "initial".

previously had nothing to do with running an IHS clinic, but submitted a contract to run the clinic for the first time in 1996, that would be an "initial" contract in 1996. Likewise, if a tribe had run some IHS medical programs in the clinic since 1990, and submitted a contract modification for 1996 to also run, for the first time, IHS dental programs, the dental portion of the contract would be an "expanded" contract in 1996. IHS, having divided contracts into these categories, then limited CSC payments to each.

First, IHS annually limited its total CSC payments to "ongoing" contracts to the total amount recommended in appropriations committee reports for that purpose.[30]

Second, IHS took the ISD Fund Congress appropriated for the "transitional costs of initial or expanded tribal contracts," and distributed that Fund among the contracts IHS had classified as "initial or expanded" on a first come-first served basis.[31] To do this IHS used its "ISD Queue" or "Priority List," which collected and then ranked tribally-contracted IHS programs by the year in

---

[30] *Compare* Aplt. App. 534 (¶ 17) *with* S. Rep. 104-125, at 94 (1995), *and* S. Rep. 104-319, at 90 (1996).

[31] Aplt. App. 200, 216-217. IHS applied the funds so designated to pay all contract support costs associated with a select few "new" or "expanded" contracts. Aplt. Att. 29.

which a tribe first contracted to carry out the program.[32] *See generally Shoshone I*, 988 F.Supp. at 1329.

Each year IHS took the ISD Fund and fully paid that year's CSCs associated with contracts at the top of the Queue, continuing down until IHS exhausted the Fund. *Id.*[33] IHS then removed those contracts from the Queue and advanced the rest. *Id.* In any given year a tribe operating a contracted IHS program listed on the Queue would be paid CSCs associated with that contract only if the contract advanced high enough to be covered by that year's ISD Fund. If not, that year the tribe once again got nothing.[34] "The net effect is that tribes are never paid CSC funds for prior years and the Priority List has grown." *Id.* at 1329.[35]

---

[32] *E.g.*, Aplt. App. 234, 244.

[33] *See also Appeals of Cherokee Nation*, Nos. 3877-3879/98, 1999 WL 440045, slip op. at 9 (IBCA June 30, 1999) ("*Appeals of Cherokee I*") (describing the Queue), *appeal dismissed sub nom. Shalala v. Cherokee Nation*, 232 F.3d 905 (Fed. Cir. 2000) (unpub'd), *on reconsideration Appeals of Cherokee Nation*, 2001 WL 283245 (IBCA Mar. 21, 2001) ("*Appeals of Cherokee II*").

[34] *E.g.,* Aplt. App. 202, 217 (par. (ii)).

[35] As reflected in the Queue list used to pay out the FY1996 ISD Fund, Aplt. App. 673, in a given year IHS did not limit the ISD Fund to contracts that were actually "new" that year. Rather, IHS kept contracts on the Queue for years, and the CSCs IHS paid from the ISD Fund in FY1996 were (with one exception) paid to ongoing contracts first awarded years earlier. *Id. See also* Aplt. App. 681 (FY1997).

Both of IHS's payment practices denied each Tribe CSC funding required to carry out their FY1996 and FY1997 contracts. *E.g.*, Aplt. Att. 27-28. It is undisputed that due to these shortfalls, both Tribes were forced to make substantial cuts in programs serving their beneficiaries.[36]

C. Sections 314 and 328

In 1998 Congress enacted an appropriations "rider" known as "§ 314."[37] The government contends that § 314 retroactively limited the appropriations that were previously available to the Secretary to pay the Tribes' contract support costs in FY1996 and FY1997, extinguishing any liability to the Tribes. Also in 1998, Congress enacted a one-year moratorium barring the Secretary from entering into further ISDA contracts.[38]

The "Queue" Policy proved highly controversial in Congress since some tribes were fully paid while others received nothing, and in FY1999 IHS abandoned it altogether. *See* H.R. Rep. 105-609, at 126 (1998) (noting "basic 'fairness' question . . . with respect to how to distribute limited funds" appropriated for CSCs). Since then, a given year's ISD Fund is only paid to contracts that in the year of payment are new or expanded. *See* IHS Cir. 2001-05, at 10.

[36] Aplt. App. 603-605, 414 (¶27).

[37] Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998).

[38] *Id.* at § 328, 112 Stat. 2681-291, *as amended by* Pub. L. 106-31, § 3004, 113 Stat. 57, 90 (1999). *See Citizen Potawatomi*, 248 F.3d at 1001 (discussing same).

D. Facts Regarding Appellant Tribes

The district court's opinion summarizes most of the undisputed facts regarding each Tribe. Aplt. Att. 7-13, 27-28.[39]

SUMMARY OF ARGUMENT

The ISDA requires the Secretary to award ISDA contracts at a contract price that includes full contract support costs. 25 U.S.C. §§ 450f(a)(1)-(2), 450j-1(a), 450j-1(g). Here, the Secretary admittedly failed to pay that price, and neither § 450j-1(b)'s "availability" or "reduction" clauses, nor § 314, excused the government from its liability.

Section 450j-1(b)'s "availability" clause is no defense because sufficient appropriations were legally available to timely pay the Tribes, both as to (1) the "ongoing" portion of their contracts and (2) the "initial or expanded" portion of their contracts. As to the former, Judge Seay's conclusion that Congress limited the availability of CSC appropriations to pay ongoing contracts is unsupported in the Appropriations Acts. As to the latter, the government correctly conceded below (*infra* 34, n.57) that the "ISD Fund" did not limit the availability of CSC appropriations to pay initial or expanded contracts.

---

[39] *See also* Aplt. App. 592-98 (table of undisputed facts).

Section 450j-1(b)'s "reduction" clause is likewise no defense because the Secretary's post-hoc excuse could never be proven given IHS's substantial increased appropriations each year.

Section 314 is no defense because when Congress purports to retroactively extinguish vested contractual and statutory rights, it renders the government liable in damages under *United States v. Winstar*, 518 U.S. 839 (1996).

Finally, when IHS enters into a contract under the ISDA, the agency is duty-bound to secure sufficient appropriations to pay it, and if it fails to do so the government remains liable for the full contract price.

STANDARD OF REVIEW & RULES OF STATUTORY CONSTRUCTION

I. STANDARD OF REVIEW

The court reviews the grant or denial of summary judgment *de novo*, applying the same legal standard as the district court under Fed.R.Civ.P. 56(c), and drawing all factual inferences in favor of the nonmoving party. *Ortiz v. Norton*, 254 F.3d 889, 893 (10th Cir. 2001).

The government in this appeal bears the burden of proof to establish that its failure to pay is excused by § 450j-1(b) or § 314.[40] *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"). Thus, summary judgment for the Tribes is "manda[tory]" if the government "fails to make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) ("In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial") (emph. added). *See also Nebraska v. Wyoming*, 507 U.S. 589, 590 (1993) ("Court views evidence through the prism of the controlling legal standard").

---

[40] *See also Javierre v. Central Altagracia*, 217 U.S. 502, 507 (1910) (applying this rule equally in the contract setting, where "appellants were seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *Shoshone I*, 988 F.Supp at 1332 (noting burden); *Shoshone II*, 999 F.Supp at 1397 (same).

The district court correctly determined that IHS's actions are reviewed *de novo* under both the ISDA and the Contract Disputes Act. Aplt. Att. 21.

II. RULES OF STATUTORY CONSTRUCTION

In addition to the ordinary rules of statutory construction,[41] the ISDA contains a special rule to resolve any ambiguous language, instructing that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding . . . from the Federal Government to the Contractor." 25 U.S.C. § 450*l*(c)(sec. 1(a)(2)).[42] Even without this statutory command, this Circuit has instructed that in ISDA cases the "canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes," *RNC*, 112 F.3d at 1462, "'constrain[ing] the possible number of reasonable ways to read an

---

[41] *See In re Overland Park Financial Corp.*, 236 F.3d 1246, 1251-52 (10th Cir. 2001); *St. Charles Investment Co. v. Comm'r of Internal Revenue*, 232 F.3d 773, 776 (10th Cir. 2000).

[42] *See also* Title III § 303(a)(7), (e) & (f) (directing Secretaries to "interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title" and "the inclusion of activities, programs, services, and functions in [such] agreements"); 25 C.F.R. §§ 900.3(a)(5) (statutory canon); 900.3(b)(8) (binding Secretary to interpret laws to "facilitate the inclusion of [ISDA] programs"); 900.3(b)(11) (applying same canon to regulations).

ambiguity.'" *Id*. In such situations, the interpretation must "benefit tribes that have chosen to enter into self-determination contracts," and it must not "depriv[e] them of funds necessary to carry out those contracts." *Id*.

ARGUMENT

I. BY MISINTERPRETING THE ISDA, THE APPROPRIATIONS ACTS, AND THE EVIDENCE, THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT UNDER § 450j-1(b) FUNDS WERE NOT "AVAILAB[LE]", AND THAT PAYING THE TRIBES WOULD HAVE REQUIRED REDUCING FUNDS FOR PROGRAMS SERVING SOME OTHER TRIBE

A. The ISDA Required That Full Contract Support Costs Be "Added" to the Tribes' FY1996 and FY1997 Agreements

The ISDA provides that tribes carrying out contracts to operate IHS programs are entitled to their full contract support costs associated with those contracts. This mandate is reflected in the statutory language guaranteeing that:

- contract support costs are amounts a tribe "is entitled to receive"; and they are "required to be paid";
- they "shall be added" to the Secretarial program amount; they "shall consist of" specified items, "shall include" various amounts, and "shall not be less than the applicable amount"; and
- "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled."

25 U.S.C. §§ 450j-1(a), 450*l*(c) (sec. 1(b)(4)), 450j-1(g). These provisions establish the firm contract price – the "amount" – for each year's contract.

It is undisputed that the Secretary here failed to pay the Tribes the full contract price of each contract. This failure would be the end of the matter, entitling the Tribes to money damages for the government's breaches, were it not for the Secretary's defenses. We discuss each in turn.

B. Sufficient Appropriations were Legally Available for the Secretary to pay the Tribes' Contract Support Costs Associated with the "Ongoing" Portion of Their Contracts

In this Part I-B we address the CSC funding for "ongoing" tribally contracted programs – those which the Tribes had already operated under contract before FY1996. Section § 450j-1(b) limits the Secretary's duty to pay to "the availability of appropriations." As to "ongoing" CSC requirements, the district court ruled that sufficient appropriations were not "available" in FY1996 and FY1997 to fully pay the Tribes. But given the Appropriations Acts' utter silence in the matter this was error, and the district court's contrary conclusion that "Congress earmarked in appropriation committee reports" the maximum appropriations available for contract support costs associated with "ongoing"

contracts (Aplt. Att. 25) fundamentally misreads the Act and federal appropriations law.[43]

---

[43] Several lower tribunals have addressed the government's mandatory duty under the ISDA to fully fund tribal CSCs out of a lump-sum appropriation, as existed here. In 1997 a two-judge IBCA panel held that "the lack of any [CSC] earmark in [a BIA] appropriation Act simply means that the Congress does not intend to change whatever prescriptions are already contained in the [ISDA]." *Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, 98-2 BCA ¶¶ 29,831, 29,832, 1997 WL 759441, at *12 (IBCA Dec. 4, 1997) ("*Alamo*") (also holding BIA liable for unpaid CSCs in years when Congress provided the BIA with "not to exceed" an insufficient CSC sum), *appeal voluntarily dismissed in part sub nom. Babbitt v. Alamo*, 185 F.3d 880 (Fed. Cir. 1998) (unpub'd) (appeal abandoned as to "lump-sum" appropriations), *rev'd in part sub. nom Babbitt v. Miccosukee*, 217 F.3d 857 (Fed. Cir. 1999) (unpub'd) ("availability" clause cancels liability when annual CSCs are limited by "not to exceed" language), *cert. denied*, 530 U.S. 1203 (2000). (The district court's citation to *Alamo* incorrectly suggests that *Alamo* was reversed. Aplt. Att. 24-25. *See Appeals of Cherokee II* at 2.)

The IBCA also rejected the government's efforts to evade its liability for unpaid contract support in an IHS case:

> Given a lump-sum appropriation, as existed here, the Secretary has a clear duty to pay CSCs in full as the authorizing Act directs. There is no discretion under the authorizing Act to withhold or reduce mandatory funds to meet other, discretionary, needs.

Appeals of Cherokee II at 4.

Similarly, the Oregon district court in *Shoshone I*, 988 F.Supp. at 1331-32, noted the mischief IHS's interpretation of a lump-sum appropriation would sow. *Id.* (rejecting an "enormous loophole" of "unfettered discretion" in such circumstances). The Ninth Circuit's recent conclusion in *Shoshone IV*, 2000 WL 33582652, at *3, that "new or expanded" CSCs were expressly capped, although in error (*infra* Part I-C), recognizes the proposition that in the absence of any appropriations language, CSC amounts must be fully paid out of an unrestricted appropriation. "In a year in which Congress appropriates sufficient money to cover the Secretary's CSF obligations, each Tribe is entitled to receive the full amount of its CSF funding." *RNSB*, 87 F.3d at 1341.

1. Funds were legally available to IHS to pay the Tribes because IHS had an unrestricted lump-sum appropriation from which to do so

Section 450j-1(b)'s "availability" clause is straightforward:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations * * *.

"Availability of appropriations" is a well-understood term of art in appropriations law, and Congress is presumed to know the law when it legislates. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

"Availability" refers to the legality of an agency's expenditure of its appropriated funds – whether "a given item is or is not a legal expenditure." U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 4-2 (hereafter "APPROPRIATIONS LAW").[44] "There are three elements to the concept of availability: purpose, time and amount." *Id.* Thus, appropriations are "legally available" when making a given expenditure (1) is among the purposes for which the appropriations were made; (2) is for an obligation arising in the same time period covered by the appropriation; and (3) is within the amount statutorily authorized for the expenditure. Applying this definition to § 450j-1(b)'s

---

[44] *See also* OMB Circular A-34 at 11.5 (2000) (answering: "**How can I tell whether appropriations are legally available?**").

availability clause, the Secretary must provide full contract payments so long as the Secretary receives appropriations that can lawfully be spent for that purpose.

The Tribes' contract payments for their ongoing contracted operations became due in a single payment at the beginning of each fiscal year, shortly after apportionment to IHS.[45] At that point, each IHS appropriation was "legally available" to fully pay both Tribes because:

> Purpose: each appropriation could lawfully be used "to carry out the [ISDA]";
>
> Time: the payments due the Tribes arose in the same year covered by the appropriation; and
>
> Amount: payments to the Tribes would not have exceeded the amounts statutorily authorized to carry out the ISDA.

In short, since ample unrestricted appropriations were legally available to pay the Tribes' CSCs associated with their "ongoing" contracted operations when those payments came due, the Tribes' rights to those payments fully vested, and the Secretary had no choice but to pay.[46]

---

[45] Aplt. App. 302 (sec. 4(a)); 340 (sec. 5(a)), and 372 (sec. 5(a)) (Shoshone); 435 (Section Twelve) (Cherokee).

[46] *RNSB*, 87 F.3d at 1342, 1345. The Secretary's arguments below about internal accounting issues and reprogramming actions simply miss the mark. *See Blackhawk Heating & Plumbing Co., Inc. v. United States*, 622 F.2d 539, 547 & n.6 ("lump-sum appropriations left [the agency] free . . . in its obligation of those funds"), 548 (availability of appropriations for an obligation does not depend on "reprogramming"

This is the plain meaning of the "availability" clause as applied to CSCs for "ongoing" contracts funded under the FY1996 and FY1997 appropriations Acts. The clause prevents the ISDA's contract price provisions from suggesting or permitting excess spending by IHS. If the Secretary's duty to pay were not limited to available appropriations, the ISDA might have been interpreted to directly grant the Secretary the power to spend without regard to an appropriations Act,[47] a departure from the ordinary spending rules laid out in the Antideficiency Act, *see* 31 U.S.C. § 1341(a)(1)(A).[48] The ISDA's "availability" clause bars the Secretary from doing so.

The district court's observation that IHS "spent" its money in other ways, and so (looking backwards) eventually had "insufficient appropriations" to

---

action), and 552 & n.9 (internal agency barriers "are purely of an in-house accounting nature and . . . irrelevant to . . . the availability of appropriated funds") (Ct. Cl. 1980).

[47] OMB Cir. A-34 at 11.1 ("***Appropriation*** means a provision of law (not necessarily in an appropriations act) authorizing the expenditure of funds for a given purpose.") (emph. added).

[48] The ISDA already overcomes the Antideficiency Act's presumption against "involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made," 31 U.S.C. § 1341(a)(1)(B), because ISDA contracts are within that subsection's "authorized by law" exception. *See Matter of Department of Education: Recording of Obligations under the Guaranteed Student Loan Program*, 65 Comp. Gen. 4, 8-10 (1985); *see also* 25 U.S.C. §§ 450f(a)(1), 450j-1(a) & (g); APPROPRIATIONS LAW at 6-53 through 6-55; Part III, *infra*.

spend its money differently, Aplt. Att. 25, disregards this legal concept of "availability."

Moreover, if by these observations the court is suggesting that under the "availability" clause CSC payments are to take a back-seat to IHS's discretionary decisions about how best to spend its lump-sum appropriations, the court's interpretation conflicts not only with the ISDA itself, but with the legislative history of the 1988 amendments (of which § 450j-1(b) was a part), reflecting a studied congressional intent to deny the Secretary all discretion over contract funding decisions. *RNSB*, 87 F.3d at 1349 ("The text of the Act demonstrates that Congress never intended to commit the allocation of [contract support funding], full or partial, to agency discretion.").

Judge Seay's formulation also conflicts with the narrow circumstances under which Congress did permit reductions to occur, § 450j-1(b)(2),[49] while neutralizing all the prohibitions on diverting full contract funding to other purposes, § 450j-1(b)(1), (3) & (4).[50]

---

49 *United States v. Johnson,* 529 U.S. 53, 58 (2000) (listed exceptions preclude permitting others).

50 *Lamb v. Thompson*, 265 F.3d 1038, 2001 WL 985547, at *10 (10th Cir. Aug. 21, 2001) (statutes must be construed to not "'emasculate an entire section'").

Indeed, to construe § 450j-1(b)'s "availability" clause as did the court below does severe violence to the "design of the statute as a whole," *True Oil Co. v. Comm'r of Internal Revenue*, 170 F.3d 1294, 1299 (10th Cir. 1999), "'and to its object and policy,'" *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993).

Finally, such a reading finds no support in the availability clause's legislative history. The clause was added in the final House rewrite without any mention by anyone, anywhere. Committee Chairman Udall noted the "more important changes," and this was not one of them.[51] This is consistent with the provision merely being a routine accounting measure, assuring that the ordinary Antideficiency Act controls would be in place.[52]

---

[51] 134 Cong. Rec. H7366-04, H7371 (Sept. 9, 1988).

[52] Significantly, even after the clause was added Chairman Udall continued to explain that under the bill contract support costs "shall be added" to the required Secretarial amount. Chairman Udall's utter silence on what would have been a sea change in the bill cuts heavily against interpreting the "availability" clause as surreptitiously sweeping aside all of the ISDA's funding mandates and all the reforms the Committee sought to achieve – particularly when 'not a dog barked in the night.' *Chisom v. Roemer*, 501 U.S. 380, 395-96 n.23 (1991). *See also Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9, 17-18 (1987) ("an amendment which would work such an alteration to the basic thrust of the draft bill . . . would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."); *Train v. City of New York*, 420 U.S. 35, 45-46 (1975) ("We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and

2. The district court erred in finding that in FY1996 and FY1997 congressional earmarks limited the legal availability of IHS's appropriations for "ongoing" contract support costs

The district court believed that "Congress earmarked in appropriation committee reports" the maximum funding amounts "to be spent on existing ["ongoing"] contract support costs." Aplt. Att. 5, 25. Legally, this is not possible.

Under general appropriations law, an earmark "means a specific statutory designation of a portion of a lump-sum appropriation or authorization." APPROPRIATIONS LAW at 6-4 n.1 (emph. added). Thus, Congress may statutorily earmark a certain amount by stating in an appropriations act that "not to exceed" a particular amount is to be used for a stated purpose. *Id.* Such a statutory "earmark" caps the amount the agency may legally spend for such purposes.[53]

In contrast,

> Restrictions on a lump-sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriation act itself, or unless some other statute restricts the agency's spending flexibility.

---

obligation.").

[53] Such "not to exceed" payment caps were applied to IHS's CSC funds in FY1998, and to the BIA's CSC funds beginning in FY1994, but not for IHS in the two years at issue here. *Supra* 12-13 nn. 23, 24, 26.

Id. at 6-159. As the Supreme Court has held, appropriation committee reports earmark nothing and do not legally control the agency:

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

Lincoln v. Vigil, 508 U.S. 182, 192 (1993). *See also* APPROPRIATIONS LAW at 2-38.

Here Congress placed no limit on the legal availability of IHS's FY1996 and FY1997 appropriations to pay "ongoing" contract support costs. The district court's reliance on mere committee recommendations in the absence of limiting statutory language was contrary to law. Given the ISDA's mandate tightly "circumscrib[ing]" the "agency['s] discretion," *RNSB*, 87 F.3d at 1344, the Secretary was required by law to meet his binding obligations to pay the Tribes full contract support costs associated with their "ongoing" contracts.

3. The district court's observations concerning IHS's subsequent expenditures are irrelevant and unsupported

The district court stated that all FY1996 and FY1997 appropriations were "already committed to pay for funding of recurring costs and other

mandatory obligations." Aplt. Att. 25. Even if this were true, it would be irrelevant; IHS's duty to timely pay the Tribes was only conditioned on IHS having appropriations legally available to do so when the payments came due – purely a question of law.[54] The ISDA did not also condition that duty on IHS first paying all other "recurring costs," "mandatory obligations" or anything else.

The district court decided that IHS could avoid its contract support obligations to timely pay the Tribes simply by deciding to spend the money it owed the Tribes in other ways. If the mandatory provisions of the ISDA and the Tribes' contracts could be so easily shunted aside they would be meaningless, and the agency would have the very unfettered discretion over contract support funding that Congress studiously wrote out of the law in the 1988 and 1994 reforms. *See RNSB*, 87 F.3d at 1344.[55] After all, under the district court's reasoning no CSC funds need be paid at all, so long as IHS eventually spent all its appropriations some other way. Even appropriation caps are unnecessary. Such a construction of the ISDA and government contracts is untenable.

---

[54] *See* Aplt. App. 498 (¶¶ 10 & 11) (IHS concurrence that an "allegation [regarding availability] constitutes a legal conclusion rather than a factual assertion").

[55] As noted in *RNSB*, 87 F.3d at 1341-42, "Congress drafted the CSF funding provisions in mandatory terms . . . and forbade the Secretary to reduce the amount of funding for virtually any reason except a reduction in appropriations or tribal authorization." And here, neither happened.

The court's assessment of IHS expenditures is also unsupported in the record. The government's key affiant only made the unremarkable statement that IHS "obligated" most of its multi-billion dollar appropriation by the end of the fiscal year, not at the beginning.[56] Aplt. App. 533-34 (¶ 16). Nothing in the record supports the proposition that remaining IHS appropriations were "already" obligated at the beginning of each year. To the contrary, according to the record it is only the Tribes' payments that were due at the beginning of each year. *Supra* 27 n.44. Borrowing from the IBCA:

> [B]efore using any funds from its lump-sum . . . appropriation for discretionary purposes, the [IHS had] a clear obligation to first give priority to the various mandatory programs and activities of the ISDA . . . , including indirect costs. The Department ha[d] no discretion in this matter.

Alamo at 12 (emph. added). *Appeals of Cherokee II* at 4 (same).

C. Sufficient Appropriations were Legally Available for the Secretary to pay the Tribes' Contract Support Costs Associated with Their "Initial or Expanded" Contracts

In Part II-B we addressed the availability of appropriations to pay CSCs for "ongoing" contracts, where Congress plainly did not limit the amount

---

[56] *Compare* Aplt. App. 530-31 (¶¶ 9-11) (describing what IHS internally "allocates," "distributes" or "retain[s]" at the beginning of the year) with Aplt. App. 533-34 (¶ 16) (describing what was "unobligated" at year end). *See also* OMB Cir. A-34 at 11.1 ("***Obligation*** means a binding agreement").

IHS could spend to pay CSCs. Accordingly, IHS was required to pay the full amount. Here we address the availability of appropriations to pay CSCs associated with "initial or expanded" contracts. The point here is the same: that in the absence of a statutory cap IHS was required to use its lump-sum appropriation, which was more than sufficient to pay the Tribes' CSCs.

We address CSCs on "initial or expanded" contracts separately only because the FY1996 and FY1997 Appropriations Acts included language concerning those CSCs. That provision said that "$7,500,000 shall remain available until expended [for the ISD Fund] . . . for the transitional costs of initial or expanded tribal contracts." The Ninth Circuit in *Shoshone IV* construed the underscored language as a "cap" on the total amount of contract support costs IHS could pay each year for these contracts. We respectfully submit this was error.

Putting aside that the matter was never briefed to the Ninth Circuit (due to the parties' agreement there that the ISD Fund language was not a cap[57]), the court's conclusion is inconsistent with the plain meaning of the operative

---

[57] *Shoshone I*, 988 F.Supp. at 1330 (noting "The parties agree. . . ."); Br. for Appellants in No. 98-36022 (9th Cir.) at 16-17, 30-31; Reply Br. for Appellants at 14, n.5. Likewise, the government conceded below that the quoted language was not a cap. Aplt. App. 525-A3 ("While these $7.5 million earmarks were originally not statutory caps, they represented Congress' suggestion as to how IHS should allocate its appropriations."). The government made the same concession before the IBCA. *Appeals of Cherokee I* at 9.

language "shall remain available until expended." That language nowhere even hints that it is limiting the maximum amount IHS may lawfully spend out of its lump-sum appropriation for this purpose. To the contrary, this precise language is used here and elsewhere strictly to indicate the "time" during which the specified funds may lawfully be spent (overcoming the usual rule that annual appropriations are available for one year only).

The very same paragraph in the Appropriations Act explains that other portions of the IHS appropriation "shall remain available" either "until expended" (in the case of the "Indian Catastrophic Health Emergency Fund") or "for obligation until [a future date]" (in the case of "contract medical care"). 110 Stat. 1321-189. Similarly, the phrase "shall be available for two fiscal years" describes the permitted expenditure of certain collections under "title IV of the Indian Health Care Improvement Act," where the amounts are not even known, much less capped. *Id*. In short, the language in the ISD provision is about when a stated sum of money may be spent after the current fiscal year on CSCs for "initial or expanded" contracts, not how much may be spent in the current year for that purpose.

This is precisely the reading the Comptroller General has given the "shall remain available" clause:

> [T]he language "of which $263,323,000 for . . . firefighting . . . shall remain available for obligation until September 30, 1988," does not represent a line-item limitation or a cap on the amount of money available for obligation for firefighting. Rather, this language expresses the availability of a specific amount as to time – two years instead of one.

Matter of Forest Service–Appropriations for Firefighting Forest Fires, B-231711 at 3, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989) (emph. added).[58]

When Congress wants to cap something it says "not to exceed." Thus when Congress in the FY1996 Appropriation Act wished to speak both to timing and a cap, it carefully used the "not to exceed" clause and the "shall remain available" clause together. 110 Stat. 1321-170-171 (doing so four times in the BIA portion of the same Act, *i.e.*, "and of which not to exceed $71,854,000 shall remain available until expended for housing improvement, ...") (emph. added).

Not only does Congress know exactly how to describe a spending limit, but in the very same Appropriations Act, Congress imposed precisely such a limit on BIA contract support cost payments, using the phrase "not to exceed."

---

[58] *See also Matter of Thad Cochran*, B-271607 at 1, 1996 WL 290140 (Comp. Gen. June 3, 1996) ("'shall remain available until expended' . . . constitutes a no-year appropriation and all statutory limits on when the funds may be obligated and expended are removed"). The district court appears to have implicitly come to this same conclusion, because in addressing "new and expanded" contracts it was forced to rely on a congressional rider (§ 314) passed years after-the-fact to transmute the $7.5 million ISD Fund into a cap.

110 Stat. 1321-170. Thus the same Act expressly provided a BIA cap on CSC payments but not an IHS cap.[59]

Congress could not have meant the same thing for both agencies, and it is not credible to suggest that Congress's choice of such different words in the one statute carries the same meaning. To the contrary, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), quoted approvingly in *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000). As in *Russello*, one should "refrain from concluding here that the differing language in the two subsections has the same meaning in each." 464 U.S. at 23.[60]

---

[59] Congress's decision in FY1998 to institute a payment cap on IHS's CSC appropriations was deliberate, not the product of ambiguous or sloppy drafting. *See* H. Conf. Rep. 105-337, at 90 (1997) ("Amendment No. 110 . . . inserts language placing a cap . . . on contract support costs in the Indian Health Service, services account. The House had no similar provision.").

[60] Resort to legislative history where no such ambiguity exists is inappropriate. *St. Charles*, 232 F.3d at 776. It also defies the Supreme Court's directive in *Lincoln* cautioning courts not to give appropriations committees' instructions the force of law when such instructions are not carried over into the statutory language itself. 508 U.S. at 192.

Moreover, here the committee report language is hardly conclusive. The House committee simply said it "has provided $7,500,000 for the [ISD] Fund," adding "[t]hese funds are to be used for new and expanded contracts." H.R. Rep. 104-173, at 97 (1995). Nothing here reflects an intent to set a maximum. The Senate committee repeats

D. The "Reduction Clause" Does Not Excuse the Secretary's Obligation to Perform Under the Contracts[61]

1. The district court's interpretation of the "reduction clause" defies its plain meaning

Section 450j-1(b)'s "reduction clause" provides 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 under this subchapter.

---

the first sentence of the House, S. Rep. 104-125, at 94, and the Conference Report adds that "the [ISD] Fund is to be used only for new and expanded contracts and that this fund may be used for self-governance compacts only to the extent that a compact assumes new or additional responsibilities that had been performed by the IHS." H.R. Conf. Rep. 104-259, at 58 (1995). Nothing here unequivocally shows an intent to cap available funds for initial or expanded tribal contracts.

The *Shoshone IV* court incorrectly quotes a portion of the House Committee language as if it describes the $7.5 million ISD Fund. *Shoshone IV*, 2000 WL 33582652, at *3. It does not. It is a part of a freestanding paragraph discussing contract support costs generally, and directing IHS, tribes and the Office of Inspector General to work "to contain the cost escalation in [CSCs]."

[61] Only when sued did the government raise the "reduction clause" defense. The record is undisputed that IHS *never* made a "reduction clause" assessment in FY1996 or FY1997. Instead, IHS argued (incorrectly) that "Congress designated[s] a certain amount each year specifically for all [CSCs] [citing committee reports]." Aplt. App. 525-A2; *see also* Aplt. Att. 27-28 (recognizing Tribes were unfunded because IHS applied an IHS circular). The "reduction clause" defense is nothing but a *post hoc* rationalization for actions that patently violated the Tribes' rights. Even in the more deferential APA setting (which this isn't), government counsel's *post hoc* rationalizations can never sustain agency action. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *Olenhouse v. Commodity Credit Corp*, 42 F.3d 1560, 1574-75, 1577 (10th Cir. 1994).

Under this clause the Secretary is excused from timely paying available funds to a tribe only when he can show that doing so would require him to reduce funding for ongoing programs serving another tribe.[62] The converse is equally true: the Secretary is required to timely fund contracts in full if he can do so without reducing funding for a program serving another tribe.

The clause is straightforward: when contract payments to a tribe become due at the beginning of a year, the Secretary may assess his existing funding to other tribes and choose not to reduce such other tribes' funding:

> [T]he Secretary should receive the CSC requests for each fiscal year and then try to allocate as much funding as possible from the lump-sum appropriation for that year to pay those requests. The end result ultimately may be the same [as under ISDM 92-2] if, in fact, the Secretary cannot possibly allocate any additional funds to pay CSC because of competing needs for funding ongoing programs and services to other tribes. However, the result cannot dictate the means, given Congress' deep suspicion of IHS.

Shoshone I, 988 F.Supp. at 1332. Under this method, the Secretary "certainly [remains] required to fund CSC with available appropriated funds before

---

[62] The district court misread the reduction clause to impose an absolute prohibition on IHS, as if it began "and the Secretary *shall* not reduce funding. . . ." Aplt. Att. 26 (saying the clause "prohibits the IHS . . ."). Section 450j-1(b) only says the Secretary "is not required" to do so.

undertaking new discretionary projects or initiatives or permitting funds to lapse to the Treasury." *Id.*[63]

The district court concluded that the Secretary met his burden simply by proving that he eventually spent everything he had. By doing so, the court effectively rewrote the reduction clause to say "the Secretary is not required to *alter IHS spending now or in the future* to make funds available . . . under this Act." Under that reading, the Secretary would never be liable for contract support costs (or, for that matter, any other contract payments) so long as IHS could and did, at some later time, eventually spend its money. Read that way, the ISDA's "contract" language and funding mandates become meaningless, for everything is always subject to IHS's unlimited discretion. Again, such a reading is not "credible," *RNSB*, 87 F.3d at 1346 n.10,[64] particularly given the controlling Indian

---

[63] *See also RNSB*, 87 F.3d at 1346 n.10 ("[the reduction clause] is intended to instruct the Secretary on how to allocate the funds *at the time he receives an appropriation*") (emph. in original); *Alamo* at 12 (ISDA mandates have priority "before [the agency uses] any funds from its lump-sum OIP appropriation for discretionary purposes"); *Appeals of Cherokee II* at 4 ("The [reduction clause] makes clear that the Secretary is not required to reduce his discretionary funding of one tribe for the sake of another one – all of which has nothing to do with his duty to fully fund the mandatory CSC contracts first.") (second emph. added).

[64] *Cf. United States v. Locke*, 529 U.S. 89, 106 (2000) (savings clause should not be interpreted to "upset the careful regulatory scheme established by federal law").

canon of statutory construction. *See also Shoshone I*, 988 F.Supp. at 1332 (rejecting "unfettered discretion").[65]

2. The government never proved – and never could prove – that paying contract support costs would have caused IHS to reduce funding "for programs * * * serving a tribe"

The Secretary never produced any evidence that could lead a trier of fact to conclude that when it received its appropriation, IHS determined it could timely pay the Tribes only by making specific cuts in ongoing programs serving some other tribe. Under Rule 56, the Tribes were thus entitled to judgment. *Ortiz*, 254 F.3d at 893.

Indeed, the Secretary here could never meet his burden. The first of two immutable facts is that each year Congress increased IHS's appropriation with substantial new unrestricted monies: $35,781,000 in FY1996, and $52,266,000 in FY1997. *Supra* at 12-13.[66] It is for this very reason that both tribunals in *Shoshone II* and *Appeals of Cherokee II* concluded that in FY1996 (also at issue

---

[65] It is inconceivable that a deeply distrustful Congress would vest IHS with such unbounded discretion by adding the reduction clause at the Eleventh Hour. Congress's goal was to eliminate Secretarial discretion, not add to it. *RNC*, 112 F.3d at 1463.

[66] In contrast to these vast sums, the principal amount IHS failed to pay the Shoshone Paiute Tribes in FY1996 was $1,667,566 (Aplt. App. 39-40 ¶¶ 14, 16), a mere 0.12132% of IHS's unrestricted appropriation.

here) IHS could never make the showing required under the "reduction clause." By definition, using these new funds at the beginning of the year to pay the Tribes' contract support costs could not have forced reductions in any recurring funding for ongoing programs serving any other tribe (even assuming all IHS activities serve tribes, which of course they do not[67]). *Shoshone II*, 999 F.Supp. at 1397.

The second immutable fact is that the President informed Congress shortly after the close of each year that IHS had leftover $76,000,000 and $98,000,000 in "end of year" "unobligated balances" for each fiscal year.[68] This, too, makes it impossible for IHS to prove that timely paying the Tribes could only have occurred at the expense of another tribe.

In sum, the government had to prove either that (1) IHS was legally required by some higher statutory mandate to first spend all of its appropriations in other ways, or (2) timely paying the Tribes would have compelled reductions in

---

[67] Not all IHS spending is for a program "serving a tribe." *See*, *e.g.*, 25 U.S.C. §§ 1621, 1621n, 1621p, 1621q, 1621t(b), 1660(a). Indeed, much of IHS's "proof" addressed program increases, non-recurring expenses, reserve accounts, research projects, conferences, initiatives, scholarship programs, grants, travel and more (Aplt. App. 544-569) – even Secretarial "administration" (*but see* § 450j-1(b)(1)) – none of which is part of the core area protected by the "reduction" clause. On these factual issues all reasonable inferences must be resolved in favor of the Tribes. *Ortiz*, 254 F.3d at 893.

[68] *Supra* 14 n.27.

discretionary ongoing programs serving another tribe. The government's proof offered nothing on those scores.

Summary judgment practice does not require the Tribes to "negate" the government's claim under the reduction clause, *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998), although the presence of both annual increases and unobligated balances does just that. Instead, the Tribes are entitled to judgment as a matter of law "simply by pointing out to the court a lack of evidence for the [government] on an essential element of the [government's] claim." *Id*. Here, not only did the government fail to "'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the [government]," *id.* – there was a total "'absence of evidence to support [its] case.'" *Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997).[69]

---

[69] The government's key affidavit is almost identical to the affidavit IHS submitted to the IBCA. There, a two-judge panel entered summary judgment against the government because IHS "provided neither adequate nor convincing proof in this case that any actual reduction of funds for other tribes would be required to fully fund Appellant's CSCs, given IHS' increased appropriations for the years in question." *Cherokee II* at 3-4.

3. The district court's ruling on the "reduction clause" was error in the absence of discovery

When IHS made its cross-motion the Tribes invoked Rule 56(f), requesting that if the district court accepted the government's ill-considered view of the clause, the Tribes be permitted discovery on the alleged undisputed "facts" (all of which are in IHS's control). Aplt. App. 577 n.5. Even if IHS's view of the clause were correct, it was error for the district court to deny the Tribes discovery. *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986).

II. SECTION 314 CANNOT WIPE OUT THE GOVERNMENT'S LIABILITY FOR UNPAID CONTRACT SUPPORT COSTS

In Part I-B we demonstrated that the Tribes' rights to have the Secretary pay them full CSCs for their "ongoing" contracts vested at the beginning of each year, because the Secretary had legally available appropriations to do so. In Part I-C we demonstrated that their similar rights associated with their "initial or expanded" contracts likewise fully vested. Since it is undisputed the Secretary failed to pay in 1996 and 1997, the government became liable for damages under the CDA and § 450m-1 of the ISDA.

The government's final response is that Congress retroactively wiped out those liabilities by enacting § 314.[70] But that is not possible. If indeed Congress years after-the-fact purported to retroactively wipe out the Tribes' vested rights, any such attempt would be an actionable breach under *Winstar*.

A. If given retroactive application, Section 314 is a breach of contractual and statutory rights, not a sovereign act

The ISDA plainly directs the federal government to award contracts under specific terms, and the ability of the government to enter into binding contracts through its agencies is "'of the essence of sovereignty' itself." *Winstar,* 518 U.S. at 884-85. For this reason, "the general principle [is] that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Id.* at 895.[71]

---

[70] Section 314 provided in pertinent part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the [BIA and IHS] by [the FY1994-FY1998 appropriations acts] for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts * * * with the [BIA or IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, * * *.

[71] Similarly with rights created by statute, any attempt by Congress "to deprive [a statutory beneficiary] of pay due for services already performed, but still

Thus, while the United States retains "sovereign power" to enact "public and general" legislation that incidentally affects those with whom it contracts, that "sovereign power" is *not* a power to "repudiate its own debts . . . simply in order to save money." *Id.* at 878-79 n.22.[72] The government simply lacks any "sovereign power" to repudiate its debts, and when it attempts to do so it is no more than a party breaching a contract:

> 'Sovereign power' as used here must be understood as a power that could otherwise affect the Government's obligation under the contract. <u>The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, Government contracts of a class including that one, or simply all Government contracts</u>.

Id. at 878-79 n.22 (emphasis added).[73]

---

owing" presents "serious constitutional questions." *United States v. Larionoff*, 431 U.S. 864, 879 (1977).

[72] *See also Winstar*, 518 U.S. at 917 (Breyer, J., concurring) (courts infer a narrow promise "not to abrogate . . . the very right that a sovereign explicitly granted by contract").

[73] *See also Winstar*, 518 U.S. at 883-85 (rejecting expansion of unmistakability doctrine as contrary to "the Government's own long-term interest as a reliable contracting party in the myriad workaday transaction of its agencies") & n. 25 (government must "'compensat[e] for the financial losses its repudiations engender'"); *id.* at 894-95 n.38 (rejecting argument that a sovereign act permits so-called "regulatory" legislation where Congress in fact "simply sought to avoid contracts it had come to regret").

In short, Congress is not free under the guise of a sovereign act to repudiate a government contract with impunity. When it does, its stands in breach. This principle applies equally to contracts to supply paper clips or jet fighters, to take over thrift liabilities, or to administer IHS programs. Were it otherwise, it would "produc[e] the untoward result of compromising the Government's practical capacity to make contracts, which [is] 'of the essence of sovereignty' itself." *Id.* at 884.

The Supreme Court reiterated last year that Congress may not simply enact legislation with impunity that cuts off the rights of a contracting party. *Mobil Oil Exploration and Producing Southeast Inc. v. United States*, 530 U.S. 604 (2000). The Ninth Circuit, likewise, recently held that "the government's rights and duties are governed by law applicable to private parties unaltered by the government's sovereign status," adding that "the government in its private contracting capacity cannot exercise sovereign power 'for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties.'" *Kimberly Associates v. United States*, 261 F.3d 864, 869, 870 (9th Cir. 2001).

Here, if § 314 cuts off the government's duty to pay contracting tribes their contract support costs, <u>its entire purpose</u> is to repudiate the government's

contractual obligations to a specific class of tribal contractors, for no reason other than to save the government money. If the provision at issue in *Winstar* was not a sovereign act,[74] *a fortiori* § 314 – whose sole effect is to cut off the Tribes' contract rights – constitutes but a simple breach.[75]

The district court considered all these cases distinguishable because it believed the "plaintiffs assumed the risk of [the] shortfall" occasioned by § 314. Aplt. Att. 29. This is preposterous. While it is true enough that the Tribes, in

---

[74] Unlike § 314, the breaching provisions at issue in *Winstar* (12 U.S.C. §§ 1464(t)(2)(a) & (9)(A)) were buried in an obscure part of an enormous thrift overhaul, 518 U.S. at 934 (Rehnquist, C.J., dissenting), much of which was "[en]acted to protect the public," *id.* at 903 (majority). Nonetheless, the Court found the offensive language to be an actionable breach.

[75] The ability to act as a sovereign is limited to those cases where the act in question is "public and general," *Horowitz v. United States*, 267 U.S. 458, 461 (1925), meaning where "the action's impact upon public contracts is . . . merely incidental to the accomplishment of a broader governmental objective," *Winstar*, 518 U.S. at 898. But,

> [t]he greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, * * *.

Id. The *Winstar* plurality put it well: "a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations." *Id.* at 899.

Construing § 314 to retroactively take vested rights under government contracts that have already been breached also imputes to Congress the bizarre intent of substituting the government's 1996 and 1997 breaches with a 1999 breach. This makes no sense.

signing their FY1996 funding agreements, assumed the risk the Secretary might not pay on time because FY1996 and FY1997 appropriations might not be legally "available" to do so, that 'condition precedent' was fully met once sufficient funds were appropriated. At that point the Tribes' rights vested, and they remained vested as the Tribes completed performance throughout each year. Just as in *Winstar*, 518 U.S. at 862-63, it is "fundamentally implausible" to suppose the Tribes further assumed the risk that long after their rights had vested and performance was complete, Congress would return five or ten years later and extinguish their rights to be paid. The Tribes took no such risk, and the district court's purported distinction "is an absurdity."[76]

To be sure – and as to CSC amounts due on "initial or expanded" contracts only – the Ninth Circuit in *Shoshone IV* reached a different conclusion. But there, it did so precisely because it concluded – incorrectly, we submit – that there was a $7.5 million cap on appropriations available for such CSC payments. 2000 WL 33582652, at *5 (concluding "there was [no] liability incurred years ago" for such payments). For the reasons noted in Part I-C, we respectfully submit the Ninth Circuit erred, so that § 314 is a breach not only of the Tribes'

---

[76] *Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("A [government's] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity").

vested rights to have the Secretary pay full CSCs for their "ongoing" contracts, but also their rights to full CSCs on their "initial or expanded" contracts. In both situations, the Tribes remain entitled to the remedy the ISDA and CDA provide: money damages.

B. It is unnecessary to give § 314 a retroactive application

Although the Tribes prevail here if § 314 is given a retroactive application, they of course also prevail if § 314 is read prospectively only. Given *Winstar*, a retroactive reading should–and can–be avoided. *Cf. Solid Waste Agency of Northern Cook Co. v. United States Army Corps of Engineers*, 121 S.Ct. 675, 683 (2001) (avoiding interpretation that "invokes the outer limits of Congress' power").

First, § 314 on its face speaks only in the present tense, to the amounts that "are . . . available" for CSCs.[77] Congress's use of this verb tense is significant and not to be ignored. *United States v. Wilson*, 503 U.S. 329, 333 (1992).[78] This present tense reading makes sense, because each year "IHS ended

---

[77] *But see*, *Shoshone IV*, 2000 WL 33582652, at *5 (incorrectly recasting to say "were . . . available").

[78] *See also Arochem Corp. v. Coan*, 176 F.3d 610, 623 (2d Cir. 1999) (statute with "are" requires present-tense interpretation).

the year with an unexpended balance from its lump sum appropriation,"[79] and without § 314 IHS could have spent that unobligated balance on CSC entitlements still owing from the year (just as IHS considered doing prior to § 314's enactment, Aplt. App. 489).[80]

Second, Congress's reenactment of an FY2000 version of § 314[81] only makes sense if § 314 is this kind of temporary annual budgeting measure, aimed at the agency's continuing present use of its unexpended balances (rather than a permanent bar to liability for past CSCs).

Finally, § 314 should not be given retroactive effect "'unless [its] language requires this result.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (emph. added), reflecting a heavy presumption in cases involving "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. *See also INS v. St. Cyr*, 121 S.Ct. 2271, 2288 (2001) (noting "demanding" standard only met by "'statutory language that was so clear that it could sustain only one interpretation.'").

---

[79] *Shoshone III*, 58 F.Supp.2d at 1197.

[80] This interpretation is supported by the legislative history. *Shoshone III*, 58 F.Supp.2d at 1200.

[81] *See* Pub. L. 106-113, § 313, 113 Stat. 1501, 1501A-192 (1999).

C. Section 314 does not bar the payment of money damages

Finally, the district court believed that "to allow the IHS to pay additional contract support costs would violate the appropriations clause because it would require spending money that had not been appropriated by Congress." Aplt. Att. 28. In referencing the Appropriations Clause and IHS's "pay[ing] additional contract support" the district court lost sight of the nature of this case.

This is not (and never has been) an injunctive suit to compel IHS to pay additional FY1996 or FY1997 appropriations. Those funds are long gone. Rather (and as the court held earlier in its opinion), it is a suit against the United States for "money damages" for breach of statutory and contractual duties. Aplt. Att. 16.

Thus, if the Tribes prevail a judgment will not "allow the IHS to pay additional contract support costs" or "require spending money that ha[s] not been appropriated by Congress." Aplt. Att. 28. It will only require awarding damages against the United States pursuant to the CDA and the ISDA. It is irrelevant that IHS lacks authority to pay whatever damages may be awarded.[82] Rather than seeking "amounts over the amount appropriated," *id.*, the Tribes simply seek

---

[82] *Shoshone III*, 58 F.Supp.2d at 1203.

damages from the United States for the breach. *Shoshone III*, 58 F.Supp.2d at 1196 ("Plaintiff does not seek funds from the Secretary") & 1204 (rejecting same Appropriations Clause defense). That § 314 "bars further [IHS] payment for those years" (Aplt. App. 29) is thus of no moment.

A district court's authority to award money damages under 25 U.S.C. § 450m-1 operates independently of the continuing availability of agency funds for contract support costs. *Shoshone I*, 988 F.Supp. at 1315; and *Shoshone II*, 999 F.Supp. at 1397 (both specifying extent of damages recoverable). Instead, such damages will be paid out of an entirely different appropriation <u>not</u> addressed by § 314 and not controlled by IHS.[83] *Lopez v. A.C.&S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1570-71 (Fed. Cir. 1994) (limit on agency appropriation does not limit the Judgment Fund appropriation); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570-71 (1997)).

---

[83] *See* Permanent and Indefinite Judgment Fund Appropriation Act, 31 U.S.C. § 1304(a).

III. ONCE IHS EXECUTES A CONTRACT UNDER THE ISDA, IT IS DUTY-BOUND TO SEEK SUFFICIENT APPROPRIATIONS, AND ITS FAILURE TO DO SO DOES NOT RELIEVE THE GOVERNMENT OF LIABILITY

The Tribes contend that sufficient appropriations were legally available to fully pay their contracts, that all their rights under the ISDA and their contracts thus vested, that all they were thereafter entitled to damages for the breach resulting from the Secretary's failure to pay, and that Section 314 could not thereafter extinguish those rights. But as explained below, even if appropriations had not been available to the Secretary, the United States 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.

The ISDA in § 450f(a)(1) vests the Secretary with "contracting authority" in advance of appropriations.[84] The Secretary's authority there to award such contracts is not conditioned on the "availability of appropriations." The precise "amount" of each contract – repeatedly specified in §§ 450j-1(a),

[84] *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977) ("legislative authorization . . . to create obligations in advance of an appropriation," creates "contract authority"); *Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975); *To the Chairman, House Comm. Merchant Marine and Fisheries*, B-211190, 1983 WL 207412 (Comp. Gen. April 5, 1983) (discussing "contract authority"); OMB Cir. A-34 at 11.1 (defining "contracting authority"); APPROPRIATIONS LAW at 6-50 - 6-53.

450j-1(g) and 450*l*(c) (sec. 1(b)(4)) – is likewise nowhere conditioned on the "availability of appropriations," and that contract "amount" can only be reduced as provided in § 450j-1(b)(2). By its own terms, the § 450j-1(b) availability clause conditions only the Secretary's own "provision of funds" – his spending – not the contract "amount."[85]

This regime establishes a common practice where an agency receives contracting authority in advance of appropriations, but is itself limited by available appropriations in its ability to liquidate those obligations.[86] In such situations, the contract remains a government obligation even when the agency secures insufficient appropriations to pay them and fails to seek supplemental funds to do so. This is the rule of *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966), and its progeny, holding that the "mere failure of

---

[85] *Russello*, 464 U.S. at 23 (presuming different words carry different meaning).

[86] Given the terms of § 450f(a)(1), the ISDA is unlike a different category of statutes where an agency's contracting authority is subject to future appropriations. *See*, *e.g.*, 25 U.S.C. § 1658 (enacted within days of the 1988 ISDA Amendments, and limiting Secretary's contracting authority "to the extent, and in an amount, provided for in appropriation Acts"); Aplt. App. 703-711 (50 statutes); *but see S. A. Healy Co. v. United States*, 576 F.2d 299, 303, 306 (Ct. Cl. 1978) (holding the government liable where "agency simply did not make an adequate [appropriations] request," even where statute provided "the liability of the United States shall be contingent upon appropriations being made therefor").

Congress to appropriate [sufficient funds] . . . does not in and of itself defeat a Government obligation created by statute."[87] Were it otherwise, many government contracts would be illusory.

The district court's endorsement of *Oglala*, *see* Aplt. Att. 26, was error because the *Oglala* court misread § 450j-1(b)'s availability clause as "expressly" conditioning the Secretary's "contracting authority," 194 F.3d at 1379. But it does not, since his contracting authority is <u>not</u> contained in § 450j-1(b), and the availability clause therefore could not condition that authority without expressly so stating.

This outcome is precisely what Congress intended in demanding full funding of ISDA contracts. In this respect, Senate Committee Chairman Inouye (the measure's chief sponsor) put it well:

> A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric of Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three

---

[87] *Gibney v. United States,* 114 Ct. Cl. 38, 53 (1949); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892); *District of Columbia v. Potomac Electric Power Co.*, 402 A.2d 430, 434, 436, 439-440 (D.C. App. 1979); *Matter of: The Hon. Jerry Lewis*, B-287619, 2001 WL 761741, at *7 (Comp. Gen. July 5, 2001).

> quarters through the fiscal year and say, "Sorry, boys, we don't have the cash, so we're going to stop right here" after you've put up all the money. At the same time, you don't have the resources to sue the Government. Obviously, the equity is not on your side. We're going to change that also.[88]

This reading is also consistent with Congress' subsequent action imposing a temporary moratorium on contracting activities in § 328 of the FY1999 appropriation, *supra* at 17, a measure expressly crafted as the "fiscally responsible course of action" in the face of increasing pressures to pay CSCs on ISDA contracts. H.R. Rep. 105-609, at 126 (1998). If the BIA and IHS contract support spending caps that Congress included in the FY1999 Appropriations Act were sufficient to limit the government's exposure, § 328 would be meaningless.

Section 450j-1(b)'s availability clause does not condition the Secretary's § 450f(a)(1) contracting authority. Thus, the government remains liable if the agency fails to seek sufficient appropriations. To the extent there be

---

[88] *Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 55 (Sept. 21, 1987). Consistent with this statement, the ISDA's funding provisions were designed (among other things) to –

> "insure that, whatever method [of allocation] is used, the tribal contractor will realize the full amount of direct program costs and indirect costs to which the contract is entitled."

S. Rep. 100-274, at 33 (emph. added).

any ambiguity in the matter, the statute commands that the ambiguity be resolved in favor of the contracting Tribes. *Supra* at 21-22.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.[89]

DATED this 26th day of October 2001.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller
William R. Perry
Melanie B. Osborne
Marissa K. Flannery

900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501-2029
Telephone: (907) 258-6377

---

[89] As this brief reflects, the Tribes do not believe Congress intended the availability clause or § 314 to cut off the government's liability to the Tribes in FY1996 or FY1997. *Supra* Parts I and II. Nor do we believe Congress intended to cut off other tribal rights when in later years it capped IHS's available appropriations. *Supra* at 13 n.26. But there are certainly ways Congress could limit the government's exposure if that were its intent. It could cut off access to the Permanent and Indefinite Judgment Fund Appropriation (as the Defense Department unsuccessfully argued had occurred in *Bath Iron*). It could permanently prohibit the Secretary from executing ISDA contracts (as it temporarily did in § 328). It could amend the Secretary's contracting authority under the ISDA (*compare* 25 U.S.C. § 1658; GAO REPORT at 57-8, Aplt. App. 154-55 (Alt. 2)). It could even go further and convert ISDA contracts into discretionary grants. 25 U.S.C. § 2008(g)(2) ("Secretary shall reduce the amount of each grant" to cover appropriation shortfall). Suffice it to say for this appeal, however, Congress has taken none of these steps.