

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' PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Page
<i>Adams Express Co. v. Croninger</i> , 226 U.S. 491 (1913)	8
<i>Allen v. Muskogee, Okl.</i> , 119 F.3d 837 (10th Cir. 1997)	3, 11
<i>Aulston v. United States</i> , 915 F.2d 584 (10th Cir. 1990)	7
<i>Barber v. General Electric Co.</i> , 648 F.2d 1272 (10th Cir. 1981)	3, 10, 11
<i>Beverly Comm. Hosp. Ass'n v. Belshe</i> , 132 F.3d 1259 (9th Cir. 1997)	15
<i>Blackhawk Heating & Plumbing v. United States</i> , 622 F.2d 539 (Ct. Cl. 1980)	3, 6
<i>Brown v. Parker-Hannifin Corp.</i> , 746 F.2d 1407 (10th Cir. 1984)	10
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	10
<i>Cherokee Nation and Shoshone-Paiute Tribes of the Duck Valley Reservation v. United States</i> , 311 F.3d 1054 (10th Cir. 2002)	1
<i>Citizen Potawatomi Nation v. Norton</i> , 248 F.3d 993 (10th Cir. 2001)	8
<i>Conaway v. Smith</i> , 853 F.2d 789 (10th Cir. 1988)	10
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	2
<i>Ewing v. Amoco Oil Co.</i> , 823 F.2d 1432 (10th Cir. 1987)	10, 11
<i>Franconia Assoc. v. United States</i> , 122 S.Ct. 1993 (2002)	3, 15
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2000)	8
<i>Holloway v. United States</i> , 526 U.S. 1 (1999)	2, 6, 7
<i>Joseph v. Wiles</i> , 223 F.3d 1155 (10th Cir. 2000)	3, 14

<i>Matsushita Elec. Indus. v. Zenith</i> , 475 U.S. 574 (1986)	3, 12, 13
<i>McDermott Int’l v. Wilander</i> , 498 U.S. 337 (1991)	7
<i>Murray v. Charleston</i> , 96 U.S. 432 (1877)	7
<i>Mustang Fuel Corp v. Youngstown Sheet and Tube Co.</i> , 516 F.2d 33 (10th Cir. 1975)	3, 10, 11
<i>NLRB v. Pueblo of San Juan</i> , 276 F.3d 1186 (10th Cir. 2002)	2, 6, 7
<i>Pasternak v. Lear Petroleum Exploration</i> , 790 F.2d 828 (10th Cir. 1986)	11
<i>Pueblo of Sandia v. United States</i> , 50 F.3d 856 (10th Cir. 1995)	12
<i>Ramah Navajo Chapter v. Lujan</i> , 112 F.3d 1455 (10th Cir. 1997) (“ <i>Ramah</i> ”)	<i>passim</i>
<i>Ramah Navajo Sch. Bd. v. Babbitt</i> , 87 F.3d 1338 (D.C. Cir. 1996)	9
<i>Russello v. United States</i> , 464 U.S. 16 (1983)	3, 14
<i>Trainor v. Apollo Metal Specialties, Inc.</i> , No. 01-5077, __ F.3d __, 2002 WL 31781136 (10th Cir. Dec. 13, 2002)	10, 12
<i>Underwriters at Lloyds of London v. N. American Van Lines</i> , 890 F.2d 1112 (10th Cir. 1989)	8
<i>United States v. Montgomery County</i> , 761 F. 2d 998 (4th Cir. 1985)	15
<i>United States v. Winstar</i> , 518 U.S. 839 (1996)	3, 15
<i>Weir v. Anaconda Co.</i> , 773 F.2d 1073 (10th Cir. 1985)	11
<i>Wyoming v. United States</i> , 279 F.3d 1214 (10th Cir. 2002)	2, 6, 8

Statutes

25 U.S.C. § 450 *et seq.* 1
25 U.S.C. § 450f(a)(1) 4
25 U.S.C. § 450j-1(1) 8
25 U.S.C. § 450j-1(3) 8
25 U.S.C. § 450j-1(4) 8
25 U.S.C. § 450j-1(a)(2) 4
25 U.S.C. § 450j-1(a)(3) 4
25 U.S.C. § 450j-1(b) 2, 4, 5, 12
25 U.S.C. § 450j-1(b)(1) 7
25 U.S.C. § 450j-1(b)(3) 7
25 U.S.C. § 450j-1(b)(4) 7
25 U.S.C. § 450j-1(g) 4
25 U.S.C. § 450l(c) (sec. 1(a)(2)) 2, 5, 7

Rules

Federal Rule of Appellate Procedure 35(b)(1)(A) 2, 3
Federal Rule of Appellate Procedure 35(b)(1)(B) 3
Federal Rule of Civil Procedure 56 2, 11, 12
Federal Rule of Civil Procedure 56(f) 10, 11
Tenth Circuit Rule 35.1(A) 1

Legislative Materials

H.R. Conf. Rep. No. 103-740 (1994) 13
H.R. Rep. No. 103-158 (1993) 13
S. Rep. No. 103-294 (1994) 13

INTRODUCTION

A distinguished panel of this Court (Murphy, Anderson and Baldock, JJ.) has held that the Secretary of Health and Human Services lawfully reduced the funds otherwise due under the Appellant Tribes' government contracts by simply choosing to allocate his Department's unrestricted lump-sum appropriation for different purposes – including payment for the very “Federal functions” that Congress expressly instructed “shall not” be paid at the expense of Tribal contractors. *Cherokee Nation, et al. v. United States*, 311 F.3d 1054 (10th Cir. 2002) (hereafter “Op. ___”) (copy attached).

With all due respect, the panel's resolution of the issues presented here guts the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (“ISDA”) – the cornerstone of this Nation's modern Indian policy – and effectively converts fixed-price government contracts into unpredictable, variably-funded discretionary grants. In addition to underpaying the Appellants, the panel's decision permits the Secretary to shortchange hundreds of other Tribal contractors both within and outside this Circuit. Congress never so intended. As explained herein, the exceptional importance of the issues so presented alone warrants the Court's *en banc* review. 10th Cir. R. 35.1(A).

The panel's decision is wrong and merits *en banc* review for several additional independent and compelling reasons:

First, the panel's decision regarding “ongoing” ISDA contracts conflicts with *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (“*Ramah*”),

and *Holloway v. United States*, 526 U.S. 1, 9 (1999), and *Wyoming v. United States*, 279 F.3d 1214, 1234-35 (10th Cir. 2002), by construing the ISDA’s “availability” clause¹ and “reduction” clause² in a manner that permits the very conduct the Act expressly prohibits. Further, it conflicts with the ISDA’s special and mandatory rule of statutory construction,³ and with decisions of the Supreme Court and this Court concerning additional rules of statutory construction in Indian cases as set forth in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (*en banc*) and *Ramah*. Consideration by the full Court is therefore necessary under Fed.R.App.P. 35(b)(1)(A) to maintain uniformity of the Circuit’s decisions.

Second, the panel’s affirmance of summary judgment for the Secretary, concluding that under the ISDA’s “availability” and “reduction” clauses the Secretary had insufficient appropriated funds to fully pay all “contract support costs” due under Appellants’ self-governance contracts, cannot be reconciled with prior holdings of this Court governing the implementation of Fed. R. Civ. P. 56. Specifically, it affirms the “drastic

¹ Section 450j-1(b)’s “availability” clause provides: “Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations * * *.”

² Section 450j-1(b)’s “reduction” clause provides: “[T]he 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.”

³ “Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding . . . from the Federal Government to the Contractor.” 25 U.S.C. § 450l(c) (sec. 1(a)(2)).

remedy” of summary judgment even though Appellants were denied any opportunity for merits discovery which could show that sufficient appropriations were in fact available to fully pay them, and they were denied inferences to the same effect which could reasonably be drawn from the evidence that was before the lower court, a result in conflict with *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 587 (1986); *Mustang Fuel Corp. v. Youngstown Sheet and Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975); *Barber v. General Electric*, 648 F.2d 1272, 1276 n.1 (10th Cir. 1981); and *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997). Here, too, *en banc* consideration is necessary under Fed.R.App.P. 35(b)(1)(A) to maintain uniformity in this Circuit’s summary judgment jurisprudence.

Third, the panel’s reliance on the ISDA’s “availability” clause and the relevant appropriations acts to deny the Tribes their funds due under their contracts presents a question of exceptional importance under Rule 35(b)(1)(B), because it creates an inter-circuit conflict with *Blackhawk Heating & Plumbing v. United States*, 622 F.2d 539 (Ct. Cl. 1980), while also construing two different terms of art in the appropriations acts to have the same meaning, contrary to the teaching of *Russello v. United States*, 464 U.S. 16 (1983) and *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000).

Fourth, the panel’s decision violates the Supreme Court’s instruction that congressional repudiations of vested rights under government contracts are compensable breaches, *United States v. Winstar*, 518 U.S. 839 (1996); *Franconia v. United States*, 122 S.Ct. 1993 (2002).

ARGUMENT

The 1975 Indian Self-Determination Act directs the Secretary to transfer certain federal programs and all associated funding to Indian tribes, upon demand. § 450f(a)(1); *Ramah*, 112 F.3d at 1456. Disappointed with the Secretary’s implementation of the Act, Congress in the 1988 Amendments massively rewrote the ISDA to require that, in transferring programs, the Secretary must award a contract at a specific contract price that includes “the full amount of funds to which the contractor is entitled,” § 450j-1(g), including the “contract support costs” required to administer the transferred programs. §§ 450j-1(a)(2), (3); *Ramah*, 112 F.3d at 1460, 1463. By special prohibitions, Congress also directed the Secretary to cease the practice of reducing contract funding to pay for various “Federal functions,” instructing that:

The amount of funds required by subsection (a) of this section –

(1) shall not be reduced [to pay] for contract monitoring or administration by the Secretary;

* * *

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring; [and]

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract[.]

§ 450j-1(b) (emph. added). In the 1994 ISDA Amendments Congress further directed that every provision of the Act “shall be liberally construed for the benefit of the [tribal]”

Contractor . . .,” § 450l(c) (sec. 1(a)(2)) (emph. added). The panel decision does not mention any of these critical provisions.

This appeal primarily concerns the interaction of these key provisions with § 450j-1(b)’s “availability” and “reduction” clauses. The former makes the provision of funds under the Act “subject to the availability of appropriations,” while the latter cautions that “the Secretary is not required to reduce funding for programs . . . serving a tribe to make funds available to another tribe . . . under [the Act].” As construed by the panel, this language means that even when the Secretary has available a substantially increased and unrestricted lump-sum appropriation that can lawfully be spent to fully pay a tribal contractor, the Secretary can still choose to pay nothing simply by budgeting the appropriation for different purposes – even the very same “Federal functions” that § 450j-1(b) bars him from prioritizing over ISDA contract payments. Such a construction of the Act is untenable, unnecessary, and foreclosed by the ISDA’s own special rule of statutory construction favoring the Tribes, not the Secretary.

1. The error of the panel’s conclusion is most acute with respect to the “ongoing” portions of the Appellants’ contracts. Here, the panel recognized that the relevant appropriations acts never “restricted or limited the amount of funds, out of the lump-sum appropriation, available for CSCs for ongoing [contracts].” Op. 10. Ordinarily, that would be the end of the matter under standard federal appropriations law, because a contract right to payment that is contingent on “available” appropriations vests as soon as an

unrestricted lump-sum appropriation is enacted from which payment may lawfully be made. *Blackhawk*, 622 F.2d at 552-53. The panel’s contrary conclusion that in such circumstances “the [agency] is . . . not obligated to completely ignore [committee recommendations]” carried over into the agency’s internal budget, Op. 20, is in conflict with the Federal Circuit’s *Blackhawk* rule that the legal availability of appropriations does not depend on “reprogramming” actions, 622 F.2d at 548, and that internal agency barriers generated by an agency’s choice not to follow such recommendations “are purely of an in-house accounting nature and . . . irrelevant to . . . the availability of appropriated funds,” *id.* at 552 n.9.

Turning to the “reduction” clause, the panel’s reading of this clause to mean that the Secretary has complete discretion to devote all of his unrestricted appropriation to other purposes, thereby rendering a sufficient appropriation “insufficient,” perpetuates the very contracting abuses the Act prohibits. As such, it is contrary to this Circuit’s and the Supreme Court’s controlling rules of statutory construction, including *Holloway*, *Wyoming*, *San Juan (en banc)* and the leading ISDA case, *Ramah*.

As noted *supra* at 4-5, in the very section to which the “reduction” clause was added, Congress went to extraordinary lengths to protect Tribal contracts from being reduced to finance all manner of “Federal functions.” The “reduction” clause’s carefully tailored exception to protect other tribes is plainly a shield protecting those tribes, not a sword empowering the Secretary to cut all tribal contract funding to finance his own

bureaucracy in defiance of §§ 450j-1(b)(1), (3) & (4). Yet under the panel’s construction, that is precisely the outcome, perpetuating the very abuse of the contracting process that led to the 1988 and 1994 reforms in the first place.

With all due respect, such a construction of the Act makes a mockery of the notion of a binding contract, *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”), and contrary to *Ramah* it utterly defeats the whole purpose of the 1988 and 1994 Amendments. Moreover, it is irreconcilable with the ISDA’s plain and direct mandate that all of its provisions “shall be liberally construed for the benefit of the [tribal] Contractor . . .,” § 450l(c) (sec. 1(a)(2)) (emph. added), a far more sweeping rule than even the special canon of construction favoring tribal self-determination in instances of ambiguous Indian legislation. *See San Juan*, 276 F.3d at 1196 (*en banc*); *Ramah*, 112 F.3d at 1461-62.

Instead of considering the “reduction” and “availability” clauses consistent with the ISDA’s “object and policy,” *Holloway*, 526 U.S. at 9; *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), and the “mischief” Congress set out to correct, *McDermott Int’l v. Wilander*, 498 U.S. 337, 349 (1991), the panel has improperly “exclude[d] from the coverage of the statute most of the conduct that Congress obviously intended to prohibit,” *Holloway*, 526 U.S. at 9 – the reduction of contract funding to support the Secretary’s bureaucracy. Such a reading improperly “permits that law to

defeat its own objectives” and thus “to ‘destroy itself.’” *Wyoming*, 279 F.3d at 1234-35 (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871-72 (2000)). *See also Underwriters at Lloyds of London v. N. American Van Lines*, 890 F.2d 1112, 1119-20 (10th Cir. 1989) (*en banc*) (narrowly construing proviso because “the act cannot be said to destroy itself”) (quoting *Adams Express v. Croninger*, 226 U.S. 491, 507-08 (1913)).

Contrary to the panel’s approach, this Circuit has consistently made clear that the overarching “object and policy” of the ISDA’s 1988 Amendments was (1) to further “the policy of [tribal] self-determination,” *Ramah*, 112 F.3d at 1461, and “tribal self-governance,” *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 995 (10th Cir. 2001); (2) to compel the Secretary to fully fund ISDA contracts, especially contract support costs, *Ramah*, 112 F.3d at 1462; and (3) to address “Congress’ obvious dissatisfaction with the pre-amendment method of funding indirect costs,” *id.* at 1463, a practice that had penalized tribes exercising their rights under the Act.

As §§ 450j-1(1),(3) & (4) further reflect, the “mischief” Congress sought to wipe out was the Secretary’s practice, repeated here, of prioritizing the funding of his own federal bureaucracy at the expense of fully paying tribal contractors – of treating contracts like variably-funded discretionary grants. Contrary to the Circuit’s approach in *Ramah*, the panel’s decision undoes all these goals, undercuts the core provisions of the Act, and defeats the accomplishment of its purpose by permitting the very conduct the

statute prohibits.⁴

The ISDA has for over a quarter century been the cornerstone of this Nation's Indian Self-Determination Policy. Indeed, virtually every Tribe in the country administers ISDA contracts with the Secretary. The panel's unprecedented conclusion, contrary to *Ramah*, that the Secretary retains "discretion" not to fully fund those contracts, even in years when ample lump-sum appropriations were available to do so, grievously undermines that policy. Before such a radical change is visited upon Tribes, Appellants respectfully suggest that this appeal be reheard *en banc*. Such review is necessary to maintain uniformity in the application of this Circuit's rules of statutory construction, to maintain uniformity with *Ramah*, and to ensure the proper interpretation of a statute that is the foundation of this Nation's policy toward all Indian Tribes.

2. In considering the "reduction" clause, the panel also concurred with the district court's "findings" that as a factual matter the Secretary did not have "sufficient" funds to fully pay the Tribes' "ongoing" contracts without reducing programs serving other tribes, Op. 17-20, and on this basis entered summary judgment against the Tribes.

⁴ This Circuit in *Ramah* underscored that the Act "does not give defendants discretion to deprive a tribe of the full amount of contract support costs which are deemed reasonable and necessary." 112 F.3d at 1463. The panel's reliance on *Ramah* to sustain such "discretion" nonetheless, Op. 20, only further underscores the need for *en banc* review. Likewise, the panel's reliance (Op. 20 n.9) on *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) underscores another inter-circuit conflict because the tightly "circumscribe[d]" discretion at issue there, *id.* at 1344; *see also id.* at 1345 n.9, concerned the narrow allocation of a statutorily-capped appropriation, not an assertion of Secretarial power to reduce contract payments by simply budgeting the funds elsewhere.

It did so notwithstanding that (1) pursuant to the parties' pretrial filing there had never been any merits discovery in this case, Appendix ("App.") 4-5 (Dkt. 7, 10), and (2) pursuant to Rule 56(f) the Tribes below timely demanded the right to discovery to respond to the Secretary's self-serving and conclusory affidavit upon which the district court subsequently relied. App. 577 n.5.

The panel's approach conflicts with this Circuit's long-standing rule that "summary judgment is a drastic remedy." *Barber*, 648 F.2d at 1276 n.1; *Conaway v. Smith*, 853 F.2d 789, 792 n.4 (10th Cir. 1988). It is not an invitation to judgment by ambush. Thus, this Circuit has long held that the movant must demonstrate entitlement to summary judgment "beyond a reasonable doubt." *Trainor v. Apollo Metal Specialties, Inc.*, No. 01-5077, ___ F.3d ___, 2002 WL 31781136, *2 (10th Cir. Dec. 13, 2002) (quotations and citations omitted); *Conoway*, 853 F.2d at 792 n.4; *Ewing v. Amoco Oil*, 823 F.2d 1432, 1437 (10th Cir. 1987); *Mustang*, 516 F.2d at 36.⁵ If "reasonable minds might differ," summary judgment is inappropriate, *Barber*, 648 F.2d at 1276 n.1, and "if an inference can be deduced from the facts whereby the non-movant might recover, summary judgment is inappropriate," *Mustang*, 516 F.2d at 36; *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984) (quoting same). Further, "[p]leadings and documentary evidence are to be construed liberally in favor of the [non-movant],"

⁵ This is particularly so when the ultimate burden at trial is on the movant, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), as it was here on the Secretary to prove his impossibility defense based on the "reduction" clause.

Mustang, 516 F.2d at 36, and “[t]he court must construe the evidence, and all reasonable inferences therefrom, in the light most favorable to the [non-movant].” *Barber*, 648 F.2d at 1276 n.1. *See also Ewing*, 823 F.2d at 1437.

The panel’s entry of summary judgment based upon the district court’s “findings” cannot be reconciled with this Circuit’s unbroken jurisprudence under Rule 56. *See Allen*, 119 F.3d at 840. Since the pretrial filings precluded all discovery,⁶ the relevant data was all in the Secretary’s possession, and the Appellants timely invoked Rule 56(f), the panel’s entry of judgment also is contrary to this Circuit’s long-standing precedent under Rule 56(f) that “sufficient time for discovery is especially important when relevant facts are exclusively in control of the opposing party.” *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081-82 (10th Cir. 1985); *compare Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 832-33 (10th Cir. 1986) (where, unlike here, non-movant failed to file an affidavit or “otherwise specifically notify the district court of the necessity of conducting additional discovery to permit it to oppose summary judgment”).

Compounding the panel’s error, and notwithstanding the absence of merits discovery, the Tribes placed before the panel two documents, either one of which permitted the inference that the Secretary had substantial unspent appropriations left at the end of each year from which the Tribes could have been paid without triggering the

⁶ The only discovery the district court permitted went to class certification issues. App. 14 (Dkt. 102). Otherwise, the parties’ pretrial filing and the district court’s subsequent pretrial Minute Order entered pursuant thereto permitted no discovery at all.

“reduction” clause. The one document the panel discussed reveals a developing IHS plan to spend leftover funds from these very years precisely as the Tribes now contend they should have been. Though undated and marked “Draft,” it could reasonably be inferred from this IHS document that such funds existed. Contrary to the panel’s approach, this Circuit requires that such evidence be “viewed most favorably to (the non-movant).” *Trainor*, 2002 WL31781136, *5 (emph. added). Although the Tribes did not need to show more to successfully resist summary judgment and move forward with discovery, they also asked that the Court take judicial notice of the President’s official Article I Budget to the Congress prepared in subsequent years, specifying exactly the tens of millions of dollars in agency funds that remained unspent from each of the two years at issue. App. Opening Br. at 14, 42; App. Reply Br. at 15 n.22 (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 861-62 n.6 (10th Cir. 1995)). The panel’s insistence that the Tribes show more in order to secure discovery in defense of a summary judgment motion thus is inconsistent with this Circuit’s long-standing jurisprudence.

Finally, the panel’s approach to the Secretary’s Rule 56 showing is contrary to *Matsushita*, 475 U.S. at 587. Critically, given both the § 450j-1(b) prohibitions against financing “Federal functions” and § 450j-1(b)’s “reduction” clause, the Secretary had to show that none of the Tribes’ contract reductions had been made to finance “Federal functions” (as contrasted with a decision to preserve “programs . . . serving [other] tribe[s]”). The single affidavit offered claimed that everything in the Secretary’s budget

other than the funds actually paid to the Tribes was committed to other tribal programs under the “reduction” clause. This contention is simply “implausible,” *id.* at 587, for it means the agency operated without financing any “Federal functions” at all.

The truth is self-evident and otherwise, with even the appropriations committees repeatedly instructing the Secretary to make “reductions . . . across all IHS administrative activities that are not related directly to the provision of health services,” H.R. Rep. 103-158, at 100 (1993) (emph. added), and demanding that IHS restructure “if additional resources are to be made available to address other priority needs, such as self-governance compacts.” S. Rep. 103-294, at 110 (1994) (emph. added). *See also* H.R. Conf. Rep. 103-740, at 51 (1994) (demanding reorganization and consolidation “to free up funding for additional self-governance compacts in [FY1995] and beyond”) (emph. added). Given the implausibility of the Secretary’s position in this setting, and considering the Secretary’s enormous annual increases and leftover funding, the panel’s failure to require more of the Secretary by way of proof was contrary to *Matsushita*, 475 U.S. at 587 (requiring movants in such circumstances to “come forward with more persuasive evidence to support their claims than would otherwise be necessary”).

3. The panel’s construction of what it perceived to be ambiguous “ISD Fund” language in the appropriations acts implementing the ISDA as to “new or expanded” contract support costs is irreconcilable with the ISDA’s command that all provisions of the Act “shall be liberally construed for the benefit of the [tribal]

Contractor” as well as the Indian canon of construction favoring tribal contractors, creating another intra-Circuit conflict with *Ramah* in the application of those rules. 112 F.3d at 1461-62. Further, it is contrary to this Circuit’s and the Supreme Court’s rule that courts must respect Congress’s deliberate choice of different language in the same enactment to convey different meanings (here, the phrases “[\$\$\$] shall remain available until expended” versus the phrase used elsewhere “of which not to exceed [\$\$\$] shall remain available until expended”), *see Russello*, 464 U.S. at 23; *Joseph*, 223 F.3d at 1161. *See also* App. Opening Br. 36-37; App. Reply Br. 9-10 n.14.⁷

4. The panel’s conclusion that Congress in § 314 was merely “clarifying” its prior appropriations acts assumes the incorrect outcome on the “availability of appropriations” issue. Obviously if no appropriations were legally available in the earlier years to pay the Tribes’ contracts – as the panel concluded (erroneously, we contend) – § 314 would be a mere retroactive confirmation and thus largely meaningless. But if, as Appellants contend, appropriations at the time were legally available, *see* Appellants’ Opening Br. 23-37, then if applied retroactively § 314 can only be a repudiation of the

⁷ As explained in Appellants’ Opening Br. 35-37, the panel’s conclusion is also contrary to the cited Comptroller General’s opinion that the precise term of art “shall remain available . . . until [a future year]” “does not represent a line-item limitation or a cap on the amount of money available for obligation,” Op. 23-24 n.10 (citation omitted; *emph. added*). As also explained there, the panel’s reliance on a General Accounting Office opinion regarding a markedly different “family” of appropriations terms, Op. 23-24 n.10, erroneously confuses terms of art that speak to maximum amounts, with a different term of art that speaks to the timing of permitted expenditures. Significantly, for these reasons the Secretary conceded the ISD Fund language was not a cap on the availability of appropriations. *See* Appellants’ Supplemental Br. 1-2.

government's vested contract obligations to the Tribe. *Id.* at 44-53.

As to “ongoing” contracts, even the panel seems to recognize that appropriations were legally available at the time (the “reduction” clause issue aside). Op. 20. As such, if construed retroactively § 314 cannot be a clarification since it actually changes the law from what it had been. After all, “WHITE cannot retrospectively be made to assert BLACK,” *United States v. Montgomery Co.*, 761 F. 2d 998, 1003 (4th Cir. 1985). Compare *Beverly Comm. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265-66 (9th Cir. 1997) (earlier enactment had received competing judicial interpretations, and new enactment was entitled “Clarification”). Simply put, if there was no “availability” cap on contract support costs in 1996, and none until § 314 was enacted in 1998, then at the time Section 314 was enacted the Tribes' rights to their full contract payments were already vested. Under those circumstances, § 314 could only work a repudiation of those rights. Contrary to the panel's view of it, congressional enactment of § 314 thus exposed the United States to damages for the resulting repudiation under *Winstar*, 518 U.S. at 878-79 n.22, 883-85 & n.25 and *Franconia*, 122 S.Ct. at 2001, 2005.

CONCLUSION

For the foregoing reasons Appellants Cherokee Nation and Shoshone-Paiute Tribes respectfully urge that this appeal be reheard by the full Court.

Respectfully submitted this 3rd day of January 2003.

SONOSKY, CHAMBERS, SACHSE,
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