

No. 01-7106

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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.

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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

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**APPELLANTS' SUPPLEMENTAL BRIEF**

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## ARGUMENT

### **The Government Continues to Concede that the FY1996 Appropriations Act (and by Extension, the Identical Language in the FY1997 Appropriations Act) Did Not Limit or Cap the Legal Availability of the Secretary’s Appropriations to Pay Contract Support Costs Associated with the “Initial or Expanded” Portions of the Appellants’ Contracts**

In *Thompson v. Cherokee Nation of Oklahoma*, No. 02-1286 (Fed. Cir. appeal docketed Mar. 15, 2002), the government concedes that the statutory language employed by Congress in the FY1996 Appropriations Act, Pub. L. 104-134, 110 Stat. 1321-189 (1996), did not limit or cap the legal availability of the Secretary’s appropriations to pay contract support costs associated with the “initial or expanded” portions of the Appellants’ contracts.<sup>1</sup> Thus, on page 33 of the Brief of Appellant in that case, the government concedes that:

Unlike the BIA, IHS’s annual appropriations acts did not place a cap<sup>17</sup> on CSC for new or expanded self-determination contracts during the fiscal years at issue here. Rather, each year Congress designated that \$7.5 million be set aside in the ISD Fund for CSC, to remain available until expended.

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<sup>1</sup> The decisions of the Interior Board of Contract Appeals in *Thompson v. Cherokee Nation* are cited throughout the Appellants’ Opening and Reply Briefs. See, e.g., Appellants’ Br. at 16 n.33, 24 n.43, 33, 40 n.63, 41-42, citing and discussing *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), reaff’d on reconsid., *Appeals of Cherokee Nation*, 2001 WL 283245 (IBCA Mar. 21, 2001) (“*Appeals of Cherokee II*”).

The government further explains its concession in footnote 17 as follows:

In order to be a statutory “cap,” the language would have to read that “not to exceed” \$7.5 million was available for new CSC, rather than that \$7.5 million “shall remain available.” *See Ramah*, 87 F.3d at 1342. As we show in the text, despite the Board’s effort in this case to distinguish *Oglala* on the basis that the appropriations act construed in that case involved a statutory cap, the *Oglala* Court’s holding that the language of § 450j-1(b) “is clear and unambiguous” is controlling.<sup>2</sup>

The government’s concession is consistent with its similar concessions elsewhere on this point. *See* Appellants’ Opening Brief at 34 n.57; Appellants’ Reply Brief at 8-9 and n.13. What is particularly noteworthy about the government’s newest concession, however, is that it is the first time the government has made the concession since the Ninth Circuit decision in *Shoshone-Bannock Tribes v. Secretary*, 279 F.3d. 660 (9<sup>th</sup> Cir. 2002) (“*Shoshone IV*”). (In its brief to this Court the government avoided directly addressing the issue, while terming the Appellants’ legal argument on this very point “belabor[ed]”. Appellee’s Opp. Br. 35 n.15.)

As explained in Appellants’ Opening Brief, in *Shoshone IV* a panel of the Ninth Circuit ruled – erroneously, in our opinion<sup>3</sup> – that the statutory language

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<sup>2</sup> Copies of excerpts of the government’s brief are attached.

<sup>3</sup> *See* Appellant’s Opening Brief at 34-38, 49; Appellant’s Reply Brief at 9-10 n.14, 16 n.23.

employed by Congress regarding “initial or expanded” CSCs was not a term of art, was ambiguous, and should be construed as a cap on the legal availability of appropriations to pay such costs. The significance of the Secretary’s new concession in the Federal Circuit is that, although the government continues to rely on the *Shoshone IV* decision, the government now expressly disagrees with the heart of its reasoning. While concessions of a party on questions of law are not binding on a court, the government’s concession seriously undermines the credibility of its continued reliance on *Shoshone IV*.

## **CONCLUSION**

For the foregoing reasons and those set forth in the Appellants’ Opening and Reply Briefs, the judgment below should be reversed.

DATED this 23<sup>rd</sup> day of August 2002.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amended Statement of Prior or Related Appeals has been served on the following attorneys or parties of record this 23<sup>rd</sup> day of August 2002 by mail:

Jeffrica Jenkins Lee  
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Cheri Tabor

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