UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR
BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89
ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

BRIEF OF APPELLANT TOMMY G. THOMPSON

JURISDICTIONAL STATEMENT

The Cherokee Nation of Oklahoma (Cherokee Nation or Tribe) invoked the jurisdiction of the Interior Board of Contract Appeals (IBCA or Board) pursuant to the Contract Disputes Act, 41 U.S.C. § 607, as incorporated into the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450m-1, to review the decision of a contracting officer (CO) of the Department of Health and Human Services, Indian Health Service, denying the Tribe's claim for additional contract support cost funding for fiscal years 1994, 1995, and 1996. The CO's final decision

on behalf of the Indian Health Service was issued on October 31, 1997 (JA Vol. I, tab 2 at 42), and the Cherokee Nation filed a timely appeal to the Board on January 27, 1998 (JA Vol. I , tab 1 at 39). *See* 43 C.F.R. § 4.102(a).

The Board's decision granting partial summary judgment to the Tribe as to liability was issued on June 30, 1999[1] (Add. 1-22),[2] and an order deferring quantum negotiations pending judicial review was issued on August 18, 1999 (JA Vol. II 466). The Board's decision permitting the government to seek reconsideration of its June 30, 1999 order on summary judgment was issued on October 31, 2000[3] (JA Vol. II 516). The Board's opinion and order on reconsideration, reaffirming the grant of summary judgment on liability to the Tribe, and denying the government's motion to dismiss, was filed on March 21, 2001 (Add. 23-27).[4] The Board's order accepting the parties' joint stipulation on quantum and entering final judgment was issued on November 15, 2001 (Add. 28-29). The government's notice of appeal, filed on March 15, 2002, was therefore timely (JA Vol. II 525). *See* 41 U.S.C. § 607(g)(1)(B). This Court has jurisdiction over this appeal under 28 U.S.C. § 1295(a)(10).

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[1] *Appeals of Cherokee Nation of Okla*., IBCA Nos. 3877-3879, 1999 WL 440045.

[2] "Add." refers to the addendum required by Fed. Cir. R. 28(a)(12).

[3] *Appeals of Cherokee Nation of Okla*., IBCA Nos. 3877-3879, 2000 WL1661493.

[4] *Appeals of Cherokee Nation of Okla*., IBCA Nos. 3877-3879, 2001 WL 283245.

STATEMENT OF THE ISSUE

The Indian Self-Determination and Education Assistance Act (ISDEA or Act), 25 U.S.C. §§ 450-450n, authorizes the Secretary of Health and Human Services (Secretary or HHS) to enter into contracts with Indian tribes for the administration of programs that the Secretary would otherwise administer. The Act also provides that the Secretary shall pay "contract support costs" (CSC) to cover the direct and indirect expenses of administering such contracts. The provision authorizing such contracts, however, makes all contract payments "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. §450j-1(b). In 1998, Congress enacted Section 314 of the Omnibus Consolidated Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998) (Section 314), which declares that the amounts "earmarked" in prior committee reports for contract support costs "are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . ." The issue presented is:

Whether, notwithstanding 25 U.S.C. § 405j-1(b) and Section 314, the Tribe is entitled to full funding and payment of its contract support costs, where Congress appropriated insufficient funds.

STATEMENT OF THE CASE

A. Nature Of The Case.

This is another in a series of recent cases by tribes alleging violations of various provisions of the ISDEA in connection with the government's funding of the tribes' operation of programs and services pursuant to self-determination contracts. This Court, and every other appellate court to have considered the issue, has construed 25 U.S.C. § 450j-1(b) as unambiguously conditioning the funding of self-determination contracts on "the availability of appropriations." *See Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000); *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660, 664-65 952 (9th Cir. 2002); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D. C. Cir. 1996). In other words, these courts have concluded that if Congress fails to appropriate sufficient funds, the agency can only spend as much money as has been appropriated for a particular purpose.

In this case, the Cherokee Nation filed a claim under the Contract Disputes Act with the Indian Health Service (IHS) seeking additional CSC, including indirect costs (IDC) that the Tribe claimed it was owed for operating certain Indian health care programs in fiscal years (FYs) 1994-1996. The IHS contracting officer denied the Tribe's claim, pointing out, *inter alia*, that there were insufficient congressional

appropriations and that funding was conditioned on the availability of appropriations. The CO also explained that IHS is not required to fund a tribe's total need for IDC where such action would reduce the funds otherwise available to other tribes.

The Cherokee Nation appealed the CO's decision to the IBCA, and the Board granted summary judgment in favor of the Tribe. The Board held that the Tribe had a contractual right to IDC under the ISDEA, despite congressional shortfalls. The Board rejected IHS's reliance on § 450j-1(b), which makes all contract payments "subject to the availability of appropriations" and provides that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contracts. The Board held that IHS had not shown that paying CSC would decrease funding for other projects or programs. The Board also rejected the Secretary's argument that Section 314 bars recovery, holding that Section 314 is "merely appropriations Act language" and that the Tribe's right to full CSC funding was not extinguished by that provision (Add. 18). On reconsideration of its ruling on liability, the IBCA again rejected the Secretary's §450j-1(b) arguments, stating that IHS had not provided "adequate" or "convincing" proof that "any actual reduction of funds for other tribes would be required to fully fund" the Cherokee Nation's CSC (Add. 26). The Secretary now appeals.

B. Statutory Scheme.[5]

1. The ISDEA.

The ISDEA authorizes the Secretary of HHS and the Secretary of the Interior, 25 U.S.C. § 450b(i),[6] "upon the request of any Indian tribe by tribal resolution," to enter into "a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof" which the Secretaries previously administered for the benefit of Indians pursuant to statute. *Id.* at §450f(a)(1). The Indian Health Service, a component of HHS, is responsible for providing primary health care for American Indians and Alaska Natives throughout the United States. *See* 25 U.S.C. § 13; 25 U.S.C. § 1601; 42 U.S.C. § 2001. IHS either directly operates, or enters into self-determination contracts with tribes to operate, approximately 150 health care delivery programs across the country. The ISDEA requires the Secretary to provide funding under self-determination contracts equal to the amount of funds he otherwise would have provided if the programs were operated by IHS – *i.e.*, the "Secretarial amount." 25 U.S.C. § 450j-1(a)(1).

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[5] Unless otherwise noted, citations to the ISDEA in this brief are to the 1994 edition of the United States Code. Relevant portions of the ISDEA, 25 U.S.C. §§ 450 *et seq.* (1994), are reproduced in a statutory addendum to this brief.

[6] Only the Secretary of HHS is a party in this case.

In addition, the Act directs that CSC be added to the funding amount provided by the Secretary, to cover certain direct and indirect costs that would not have been incurred by the Secretary if IHS operated the programs.[7] 25 U.S.C. § 450j-1(a)(2). Significantly, the Act conditions all funding of self-determination contracts on the "availability of appropriations" and the Secretary's obligation to continue to operate programs for non-contracting tribes. An unnumbered paragraph at the end of § 450j-1(b) states:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is *subject to the availability of appropriations* and the Secretary *is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter*.

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

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[7]"Contract support costs" are not defined in the definitions section of the ISDEA; however, the phrase is generally understood to include direct and indirect costs. The Act defines "direct program costs" to mean "costs that can be identified specifically with a particular contract objective." 25 U.S.C. § 450b(c). "Indirect costs" include "costs incurred for a common or joint purpose benefiting more than one contract objective . . . ." *Id.* at § 450b(f). Contract support costs that are eligible costs include "direct program expenses" for the operation of the program under contract and "any additional administrative or other expense related to the overhead incurred by the tribal contractor" in connection with operation of the federal program. *Id.* at 450j-1(a)(3(A).

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

2. <u>Congressional Appropriations For CSC</u>.

For FY 1994, Congress appropriated a total of $1,645,877,000 to the IHS, of which $7.5 million was earmarked to "remain available until expended, for the Indian Self-Determination [ISD] Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act."[8] Department of the Interior and Related Agencies Appropriations Act, 1994,

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[8]Beginning in FY 1994, and for each fiscal year involved in this dispute, the Appropriations Committees identified CSC for ongoing self-determination contracts in committee reports as a "subactivity" of the Hospitals and Clinics budget activity. The Committees specifically added or reduced funds for ongoing CSC and recommended that IHS spend the funds accordingly, in addition to the ISD Fund line item. *See* H.R. Rep. No. 103-158 at 100, 104 (1993) (recommending $134,686,000 for CSC for ongoing contracts for FY 1994); H.R. Rep. No. 103-551 at 103 (1994) (recommending $145,738,000 for ongoing CSC for FY 1995); H.R. Rep No. 104-173
(continued...)

Pub. L. No. 103-138,107 Stat. 1379, 1408 (1993); *see also* Joint Explanatory Statement of the Comm. of Conf., 139 Cong. Rec. 24,835, 24,850 (1993) (the conference managers' recommendation "[e]armarks $7,500,000 for the self-determination fund instead of $8,000,000 as proposed by the House and $7,000,000 as proposed by the Senate").

For FY 1995, Congress increased IHS's total appropriation to approximately $1.7 billion. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2528 (1994). Again, only $7.5 million was segregated from the lump-sum appropriation for the ISD Fund to be expended for CSC for new or expanded self-determination contracts. *Id.*

Similarly for FY 1996, Congress appropriated a lump-sum of $1,747,842,000 to IHS programs and designated $7.5 million for the ISD Fund for new or expanded contracts. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).[9]

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[8](...continued)
at 97 (1995) (recommending $153,040,000 for ongoing CSC for FY 1996).

[9]Also for FY 1997, Congress appropriated a lump-sum of approximately $1.8 billion to IHS for administration of the ISDEA, of which $160,660,000 was earmarked in the appropriations committee report to be spent on CSC. *See* S. Rep. No. 104-319 at 90 (1996). Congress again set aside $7.5 million in the ISD Fund for new or expanded contracts. Omnibus Consolidated Appropriations Act, 1997, Pub. (continued...)

3. IHS's Implementation.

Congress recognized the difficulty IHS faced in allocating finite resources among competing Tribal interests and left to IHS's discretion how best to distribute those resources. The ISDEA therefore provides that "[p]ayments . . . under any [self-determination] contracts pursuant to section 450f . . . of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part." 25 U.S.C. § 450j(b). Because of chronic congressional under-funding of CSC, IHS developed an allocation policy to deal with anticipated appropriations shortfalls. *See* IHS Circular No. 96-04 (April 12, 1996); Indian Self-Determination Memorandum No. 92-2 ("ISDM 92-2") (Feb. 27, 1992).[10] (JA Vol. I, tabs 6, 7).

IHS established three pools of funding within its single budget activity for CSC: (1) Pool No. 1 (the ISD Fund for new and expanded contracts) represents any

[9](...continued)
L. No. 104-208, 110 Stat. 3009, 3009-212, 3009-213 (1996). For FY 1998, Congress enacted a statutory cap in the appropriations act for that fiscal year on the amount that could be obligated by IHS for CSC. Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997)("not to exceed $168,702,000 shall be for payments to tribes . . . for [CSC] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended").

[10]These circulars are internal agency guidelines adopted by the Secretary pursuant to 25 U.S.C. § 450k(a)(1) and 25 C.F.R. § 900.5.

increase in IHS's appropriation for CSC for new and expanded contracts; (2) Pool No. 2 (Ongoing Awards) represents amounts awarded in a prior year that are made available to IHS on a recurring basis; and (3) Pool No. 3 (Mandatory Increases/Shortfall Funds) represents "amounts provided for mandatory increases on the prior year 'base' and shortfall funds, if appropriated." IHS Circular 96-04 § 4(A)(4)((JA Vol. I, tab 7 at 101).

With respect to funding Pool No. 1, compromised of the $7.5 million ISD Fund that Congress appropriated for CSC for new and expanded contracts for each of fiscal years 1994-1996, IHS placed all requests in a queue or priority list based on date of receipt. IHS Circular No. 96-04 § 4(A)(4)(a)(iii) (JA Vol. I, tab 7 at 102). Approved requests for CSC support costs would be 100% funded on a first-come first-served basis. *Id.* at § 4(A)(4)(a)(ii) (JA Vol. I , tab 7 at 102). Once funds were exhausted, however, tribes awaiting new CSC funding on the priority list would be provided new CSC funds according to the date of the individual request, when additional appropriations were made available. *Id.* The $7.5 million appropriation for the ISD Fund each fiscal year was not enough to fund all tribal requests on the ISD queue. Unfunded requests remained on the queue in priority order awaiting funding from future ISD Fund appropriations. Cesari Decl. ¶ 3 (JA Vol. II 449-50).

As for ongoing awards (funding Pool No. 2), each tribal contractor's indirect CSC need is determined by calculating any changes in indirect cost rates. If the funds available in the IHS Area office's indirect cost base are not adequate to meet all contractors' needs, then the amount available is distributed according to each tribe's proportion of total need. These funds are awarded as nonrecurring funds. IHS Circular No. 96-4 § 4(A)(4)(b) (JA Vol. I , tab 7 at 105).

Finally, mandatory increases (Pool 3) that reflect a percentage of the Area's prior year recurring indirect cost base are distributed annually, as available. Additional shortfall funds that are made available and allocated to Area offices are also distributed annually. Because tribes are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount available for this purpose. If a tribe's additional need is proportionately greater, it will receive a greater percentage of CSC mandatory increases and shortfall funds. *Id*. at § 4(A)(4)(c) (JA Vol. I, tab 7 at 105-06).

IHS developed this CSC payment system with the active participation of representatives from Indian Tribes. IHS Circular No. 96-04 § 2 (JA Vol. I, tab 7 at 93-94). The procedures have been applied to self-determination contracts since 1992 and were subsequently applied to self-governance compacts. *Id.* Tribal consultation

has thus been an integral part of the formulation and implementation of IHS' contract support cost policy. Cesari Decl. ¶ 3 (JA Vol. II 449).

Each tribe's indirect cost rate is determined through an annual negotiation with the Department of the Interior's Office of the Inspector General (OIG), pursuant to Office of Management and Budget (OMB) Circular A-87.[11] *See* 46 Fed. Reg. 9548 (Jan. 28, 1981). Further, tribes may request direct CSC for certain costs not included in the indirect cost rate. *See* IHS Circular 96-04 § 4(A)(2)(b) (JA Vol. I , tab 7 at 97-98).

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[11]The tribe and the OIG typically determine the amount of funds the tribe expects to receive in a given year (base funding), less certain "pass through" amounts such as capital expenditures and subcontracts over a specified dollar amount, and the indirect cost amounts needed to support that base (the indirect cost pool). The ratio of the indirect cost pool to the base funding is called the "indirect cost rate." The indirect cost rate is multiplied by the base funding for each program in a particular year (less certain pass through and capital expenditure costs) to determine the amount of indirect costs associated with the particular program. In essence, the indirect cost rate is used to apportion CSC need among various programs. At the end of the year, there is a reconciliation between the indirect costs anticipated and the actual amount expended. When actual indirect expenditures fall short of anticipated expenditures, the tribe is said to have an "over-recovery." Similarly, when indirect expenditures exceed anticipated costs, the tribe has an "under-recovery." The OIG allows for what is called a "fixed with carry forward" rate, which the Cherokee Nation elected to adopt in this case. Demaray Decl. ¶ 9 (JA Vol. II 462). Under this method, over- and under-recoveries are considered in calculating the contract support pool in a subsequent year's negotiation with OIG. Thus, if a tribe had an under-recovery of $1,000 of in FY 1994, its support pool would be increased by $1,000 in determining the indirect cost rate for FY 1995. In other words, the indirect cost rate self-adjusts depending on the amount of the over- or under-recovery.

Following Congress's recommendations and IHS's CSC allocation policy, IHS distributed its limited appropriation for new CSC requests on a first-come, first-served priority basis in each FY at issue here. Because the requests for CSC for new and expanded contracts for FYs 1994, 1995 and 1996 were well in excess of the $7.5 million in new congressional funding, full CSC funding was not available for some tribes. Fitzpatrick Decl. ¶¶ 6, 7, 8 (JA Vol. II 426).

4. Section 314.

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

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

The public laws cited in the statute had earmarked $7.5 million for the payment of CSC for new and expanded programs each year between 1994 and 1998. In particular, Pub. L. No. 103-138, 107 Stat. 1379 (1993); Pub. L. No. 103-332, 108 Stat. 2499 (1994); and Pub. L. No. 104-134, 110 Stat. 1321-189 (1996), are the appropriations acts for FYs 1994, 1995 and 1996, which were discussed above. Section 314 therefore clarified Congress's intent that the $7.5 million ISD Fund was "'all there [wa]s'" for new CSC in those years. *See Shoshone-Bannock*, 279 F.3d at 667. Further, Section 314 capped the total amount for CSC shortfalls in those years at the amounts earmarked in committee reports, and prohibited IHS from using *future* funding to pay shortfalls for *previous* years.

C. Statement of Facts.

The Cherokee Nation has operated various IHS-funded health care programs under one or more self-determination contracts for a number of years. Compl. ¶5 (JA Vol. II 395). On June 30, 1993, the Nation entered into a Compact of Self-Governance and associated Annual Funding Agreement ("AFA") with the United States which covered pre-existing programs that had already been subject to self-determination (JA Vol. I, tab 5).[12] The Compact expressly states that the Secretary's

[12]The Tribe's compact with the United States was entered into pursuant to Title III of the ISDEA (25 U.S.C. § 450f note (1994)) a demonstration project known as the (continued...)

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

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

Compact of Self-Governance Between the United States of America and the Cherokee Nation, art. IV, sec. 3 (June 30, 1993) (JA Vol. I , tab 5 at 73) (emphasis added). The Tribe's FY 1994 AFA provided: "The parties agree that adjustments may be made due to Congressional action." FY 1994 AFA, Attach. 1 to Compact of Self-Governance Between United States of America and Cherokee Nation, sec. 7 (JA Vol. I, tab 11 at 171) .

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[12](...continued)
Tribal Self-Governance Project, which was established to improve and perpetuate the government-to-government relationship between Indian tribes and the United States. Upon reviewing the results of the project, Congress repealed Title III, enacting in its place provisions permanently establishing tribal self-governance within HHS. *See* Pub. L. No. 106-260, 114 Stat. 713 (2000) (codified at 25 U.S.C. §§ 458aaa to 458aaa-18 (2000)). Because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, *see* 25 U.S.C. § 450j-1(b), the terms "contract" and "compact" are used interchangeably throughout this brief.

The Cherokee Nation's AFA for FY 1995 also states that funding is contingent on the availability of appropriations. It specifically states that "[t]he parties agree that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation notified of such actions." FY 1995 AFA Between the United States of America and Cherokee Nation, sec. 10 (JA Vol. I, tab 18 at 277). Similarly, the Tribe's FY 1996 AFA notes the parties' agreement "that adjustments may be appropriate due to unanticipated Congressional action" (JA Vol. I, tab 23 at 345).

Section 6 of each of the Nation's AFAs provided that the amount of funds for indirect costs would be established and paid based on the Nation's indirect cost rate. *See* FY 1994 AFA, sec. 6 (JA Vol. I, tab 11 at 171) ("[t]he amount of funds allocated to the Nation under this annual funding agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated for the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose"); FY 1995 AFA, sec. 6 (JA Vol. I, tab 18 at 276) (indirect cost funding "shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1995"); FY 1996 AFA, sec. 6 (JA Vol. I, tab 23 at 344) (amount of funds allocated to the Nation for indirect cost funding "shall

be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996").

Cherokee assumed responsibility for operating the Sallisaw Clinic in FY 1992, the Stilwell Clinic in FY 1994, and the Contract Health Services Out-Patient (CHS-OP) Program in FY1995 (JA Vol. I, tab 8 at 121; tab 9 at 138; tab 10 at 153). In 1996, Cherokee requested CSC for these new programs and was placed on the Indian Self Determination queue with the understanding that sufficient congressional appropriations were not presently available. JA Vol. I , tab 8 at 119; tab 9 at 136; tab 10 at 152; ISD Queue (JA Vol. II at 427-28). IHS had already spent $7.5 million on new CSC for tribes ahead of Cherokee on the queue, and Cherokee had not yet reached the top of the queue. Cherokee thus did not receive any additional funding for CSC for those new programs in FY 1996.

Based on the reconciliation agreed to by the Nation and IHS for the FYs at issue here, the total direct funding level for the Cherokee Nation programs under its FY 1994 AFA was $18,377,612 (JA Vol. I, tab 2 at 42). IHS paid the Tribe $1,399,337 in indirect costs based on the indirect cost rate of 14.3% negotiated between the Cherokee Nation and the OIG for FY 1994 (*id.* at 43). In FY 1995, the total direct cost funding level for the Cherokee Nation's programs was $24,332,802 and IHS paid IDC of $1,441,249 based on an indirect cost rate of 17.1% (*id.* at 42,

43). The Tribe's total direct cost funding level in FY 1996 was $24,681,697, and IHS paid IDC in the amount of $1,705,925 based on an indirect cost rate of 12.2%. *Id.*

D. <u>Course of Proceedings And Disposition Below</u> .

1. The Tribe's CDA Claim And IHS's Decision.

On September 27, 1996, the Cherokee Nation submitted a claim to IHS pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq*. (JA Vol. I, tab 3). The Tribe alleged that it was entitled under its AFAs to additional indirect costs in the amount of $1,769,148 for FY 1994; $2,794,595 for FY 1995; and $1,805,266 for FY 1996, or a total of $6,369,009 (JA Vol. I , tab 3 at 55).

In a final decision issued on October 31, 1997, the IHS contracting officer denied the Cherokee Nation's claim.[13] The CO stated that, based on the direct funding levels established during reconciliation, an estimate of the costs exempted under the IDC rate agreements ("pass through" items), the IDC rate applied, the IDC

[13]In accordance with 41 U.S.C. § 605(c)(2)(B), IHS had previously notified the Tribe that due to the complexity of its claim and the need to reconcile documentation, the agency would need additional time to issue a final decision (JA Vol. I , tab 3 at 46-49).

need, the amount of IDC paid, and the balance over- or under-funded, IHS's calculations showed that (JA Vol. I , tab 2 at 43):[14]

> In FY 1994, the IHS overpaid the Nation by $143,319 based on an IDC rate of 14.3%.
>
> In FY 1995, the Nation's need for IDC exceed[ed] the IHS payment by $945,485 based on an IDC rate of 17.1%.
>
> In FY 1996, the IHS overpaid IDC costs by $6,230 based on a 12.2% IDC rate.

The CO explained that although the Nation had a shortfall in FY 1995 of $945,485, IHS could not meet the Tribe's full need for several reasons: (1) Congress failed to appropriate sufficient funds for CSC to meet the total need of all tribes for indirect costs; (2) the Nation's compact and the ISDEA, § 450j-1(b), expressly state that the provision of funds under the AFAs is subject to the availability of appropriations; (3) the AFAs contained various provisions indicating that the amount specified for IDC/CSC was not a sum certain and that further adjustments would be made based on congressional action and further negotiation between the parties; and (4) § 450j-1(b) "makes it clear that IHS is not required to meet the Nation's total need

[14]The CO noted that the amounts reflecting the Cherokee Nation's requests for CSC for new and expanded programs already on the ISD queue were deducted before applying the IDC rate for each fiscal year in question (JA Vol. I, tab 2 at 45 (Notes)).

for indirect costs where such action would reduce the funds otherwise available to other tribes." JA Vol. I, tab 2 at 43.

2. Proceedings Before the IBCA.

The Cherokee Nation challenged the CO's decision in an appeal filed pursuant to 41 U.S.C. § 606 with the IBCA on April 17, 1998. The complaint alleged two causes of action: (1) that IHS had breached its compact with the Tribe by failing to pay adequate CSC (including indirect costs) in FYs 1994, 1995 and 1996; and (2) that IHS violated the ISDEA by failing to pay adequate CSC in those fiscal years. Compl. ¶¶ 57-59, ¶¶ 61-62 (JA Vol. II 410-11). The complaint averred that Cherokee was entitled to additional "recurring direct contract support costs" of $273,995 for FY 1994 for the Stilwell Clinic and $197,690 for the Sallisaw Clinic, as well as "non-recurring direct contract support costs" of $204,499 for Stilwell, and $163,397 for Sallisaw. Compl. ¶ 27 (JA Vol. II 402-03). With respect to FY 1995, the Nation claimed that it was owed an additional $3,232,445.14 in CSC, representing recurring and non-recurring direct CSC for the ongoing Stilwell and Sallisaw Clinics and the CHS-OP Program. Compl. ¶¶ 39, 41(JA Vol. II 405-06). The Cherokee Nation also alleged it was entitled to additional CSC in the amount of $1,739,710.86 for FY 1996, representing recurring direct CSC for the Stilwell, Sallisaw and CHS-OP programs. Compl. ¶ 50-52 (JA Vol. II 408-09).

The matter came for decision before the Board on the government's motion to dismiss in light of the intervening enactment of Section 314, and the Tribe's motion for partial summary judgment as to liability. The Board bifurcated the appeal, and on June 30, 1999, issued an opinion that addressed only entitlement (Add. 1-22). The Board held that despite the "subject to the availability of funds" language of the ISDEA, "when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be, and it cannot avoid its obligations because of reduced appropriations in situations where the other party has already performed, *unless* the Congress has made abundantly clear its intention to repudiate the contract or contracts involved" (Add. 16) (citing *Appeals of the Alamo Navajo Sch. Bd, Inc. & Miccosukee Corp.*, IBCA Nos. 3463-3466, 3560-3562, 1997 WL 759441 (Dec. 4, 1997)) (*Alamo/Miccosukee*).[15] The IBCA thus concluded that IHS was "bound by

[15]In the consolidated appeals in *Alamo/Miccosukee*, the Board held that the Bureau of Indian Affairs (BIA) was required to fund the total amounts of indirect costs sought by the Alamo tribe, despite shortfalls in the total amounts appropriated. In so holding, the Board concluded that "the restriction in the authorizing Acts, to the effect that the Indian tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, simply does not apply where the current . . . appropriation is in the form of an unrestricted lump-sum amount that is more than sufficient to cover such mandatory funding and where the Department's current appropriations Act lacks any statutory earmark affecting the use of funds for such purposes." 1997 WL 759441 at 10. The Board also held with respect to the
(continued...)

the mandatory language of the [ISDEA] and its agreements with Indian Tribes executed pursuant thereto, despite any shortfalls in the total amounts appropriated, because in providing indirect costs under the Act, the Department is performing an essentially ministerial function, and it has no authority to modify administratively the clear statutory mandates giving priority to indirect costs" (Add. 16-17).

The Board next rejected IHS's reliance on Section 314, stating that it "is merely appropriations Act language" (Add. 18), and that Congress "was simply prohibiting the future use of unspent appropriated funds for the 5 prior years as a budgetary measure" (Add. 21). The Board thus concluded that the Cherokee Nation's right to full payment of its CSC for the years in question "has not been extinguished and [the Tribe] is entitled to the unpaid funds" (Add. 21).

The IBCA held, finally, that Section 314 does not bar payment from the Judgment Fund (31 U.S.C. § 1304). (Add. 21). To hold otherwise, the Board concluded, would leave the Tribe without a remedy. *Id.*

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[15](...continued)
Miccosukee Corporation that the tribe was entitled to full funding of its indirect costs despite funding shortfalls and an express statutory earmark. *Id.* The BIA appealed, challenging only the Board's decision as to Miccosukee. As discussed *infra*, *Miccosukee* was reversed by this Court on appeal as a companion case to *Oglala*, *supra*. *See Babbitt v. Miccosukee Corp.*, 217 F.3d 857 (Fed. Cir. 1999) (table, text available in Westlaw, 1999 WL 989060), *cert. denied*, 530 U.S. 1203 (2000).

The Board remanded the matter to the parties to agree on the amount of CSC owed in accordance with its decision. At the parties' request, the Board later entered an order deferring quantum negotiations pending judicial review. JA Vol. II 466. The Secretary filed a timely notice of appeal to this Court on October 29, 1999; however, the appeal was later dismissed for lack of finality (JA Vol. II 467).

On remand, IHS moved for reconsideration,[16] relying on this Court's rulings in *Oglala/Miccosukee*, *supra*, that given the ISDEA's "subject to the availability of appropriations" language, the payment of CSC beyond congressional appropriations is not required. IHS also reiterated that under § 450j-1(b), the Secretary is not required to reprogram funds from programs serving other tribes to pay the Cherokee Nation's full CSC request. The IBCA rejected these arguments, however, concluding – without holding a further evidentiary hearing – that 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 [Cherokee's] CSCs . . . ." Add. 25-26.

Referring to its earlier opinion of June 30, 1999, the Board stated that "the payment of CSCs is clearly mandatory, subject only to an unrestricted (i.e., lump sum) availability of appropriations" (Add. 26). According to the Board, "[t]he last

[16]IHS also reserved its rights with respect to its motion to dismiss based on Section 314, but did not seek reconsideration of the Board's ruling to dismiss at that time. Gov't's Br. in Supp. of Recons. of Partial Sum. J. on Liability at 2 n.1.

-sentence proviso of subsection (b) 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. 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" (Add. 26) (citing *Ramah*).

The Board therefore adhered to its earlier decision. The parties later stipulated to damages of $8.5 million, plus interest from September 30, 1996, and the Board entered a final order accepting the stipulation on November 15, 2001 (JA Vol. I 28).

STANDARD OF REVIEW

This Court reviews the grant of summary judgment "as a matter of law, to determine that no genuine issues of material fact exist when the record is read in the light most favorable to the non-moving party, and that the moving party is otherwise entitled to judgment on the law." *Oglala*, 194 F.3d at 1377 (citing *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed. Cir. 1992)). The decision of the IBCA "on any question of law shall not be final or conclusive." 41 U.S.C. § 609(b). However, the Court gives "careful consideration

to the Board's legal conclusions in recognition of its 'considerable expertise in construing government contracts.'" *Oglala*, 194 F.3d at 1377 (citation omitted).

SUMMARY OF ARGUMENT

As three circuits, including this one, have now held, the ISDEA states in clear, unambiguous language that "notwithstanding any other provision" of the Act, the requirement of funding of self-determination contracts is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b); *see Oglala*, 194 F.3d at 1378; *Shoshone-Bannock*, 279 F.3d at 664-65; *Ramah*, 87 F.3d at 1345. The Act requires that self-determination contracts contain this condition. *Id.* at § 450*l*(c). Moreover, the ISDEA provides that "the Secretary is not required to reduce funding for programs, projects, or activities" serving other tribes in order to fully fund a self-determination contract. *Id.* at § 450j-1(b). In other words, Congress declared in the ISDEA that the Secretary is not required to "rob Peter to pay Paul." Consequently, if funding CSC or other aspects of self-determination contracts would require the Secretary to *reduce* funding for other IHS initiatives serving non-contracting tribes, contracting tribes do not have an entitlement to full payment. The statute therefore does not obligate the Secretary to fund the Cherokee Nation's FYs 1994, 1995 and 1996 CSC beyond the amount of appropriations made available for that purpose.

The Board 's holding – that the Cherokee Nation has both a statutory and a contractual right to full contract support costs funding for fiscal years 1994, 1995 and 1996 – is thus wrong as a matter of law because it is contrary to the ISDEA, contrary to express limitations in the contract, and contrary to established precedent cited above. Accordingly, the Board's decision should be reversed by this Court.

For each of the fiscal years at issue here, Congress segregated only $7.5 million of IHS's annual lump-sum appropriation into the ISD Fund to be spent on CSC for new or expanded self-determination contracts. Because the requests for CSC for new or expanded contracts for the FYs at issue were well in excess of the $7.5 million in new congressional funding each year, the Secretary allocated the limited funds on a first-come, first-served priority basis in accordance with Congress's recommendation and an internal agency guideline specifically designed to deal with such funding shortfalls. In doing so, the Secretary effectuated the congressional intent of funding CSC to the extent of available appropriations, without taking money away from programs serving other tribes.

As we further discuss, the Cherokee Nation has no contractual right to full funding of its CSC. The contracts at issue incorporated the applicable statutory limitations; thus, the Secretary's contractual obligation to fund CSC was contingent on the availability of appropriations. Because Congress's recommendations and the

spending bills limited the amount of funds available, IHS is not obligated to pay any CSC beyond the constraints established by Congress.

Moreover, Congress's 1998 enactment of Section 314 confirms the correctness of the Secretary's construction of the ISDEA and the limits on CSC funding. Section 314 declares that "amounts appropriated to or earmarked in committee reports . . . for payments to tribes . . . for [CSC] . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . ." As the Ninth Circuit, the only appeals court to have construed the provision, held in *Shoshone-Bannock*, *supra,* Section 314 makes it clear that the Secretary's authority to obligate funds for CSC under the ISDEA during the pertinent FYs was limited to the amounts earmarked in committee reports and appropriated each year.

Even prior to Section 314's enactment, the Tribe had no unconditional right, fully vested or otherwise, to full CSC funding under the ISDEA. Rather, as we explain, funding was always contingent on the availability of appropriations, and the Cherokee Nation specifically contracted with knowledge of that contingency and knowledge of the historical under-funding of CSC and the existence of the first-come, first-served queue. Because Section 314 simply clarifies Congress's original intent, its application here would not repudiate any fixed right of the Tribe.

In addition, because IHS had already reached the statutory funding limit for CSC as a consequence of paying the CSC requests of other tribes higher up on the priority list than the Cherokee Nation, provision of funds to the Tribe now, in excess of that limit, would violate the Appropriations Clause. That Clause commands that no money may be paid out of the Treasury unless it has been appropriated by an act of Congress. Art. I, § 9, Cl. 7. Finally, the sweeping introductory phrase in Section 314 commanding that "[n]otwithstanding any other provision of law," the amounts appropriated by Congress for CSC are the total amounts available for such purposes, forecloses resort to the Judgment Fund to pay the Tribe's claims.

ARGUMENT

I. THE TRIBE HAS NO STATUTORY ENTITLEMENT TO FUNDING OF ITS CONTRACT SUPPORT COSTS BEYOND AVAILABLE APPROPRIATIONS.

Statutory construction begins with the plain language of the statute under scrutiny. *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *Oglala*, 194 F.3d at 1377. Thus, the courts must assume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). And "[w]hen the words of a statute are unambiguous, then, 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

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

The starting point for analysis in this case is 25 U.S.C. § 450j-1, which is entitled "Contract funding and indirect costs." As discussed previously, in providing funds for a self-determination contract, the ISDEA requires the Secretary to provide direct program costs of not less than he would have otherwise provided if IHS directly operated the contracted program (the Secretarial amount), as well as various overhead costs associated with operation of the program – *i.e.*, CSC. 25 U.S.C. § 450j-1(a)(1) & (2). However, the ISDEA expressly conditions the funding of self-determination contracts, including funding for CSC, on "the availability of appropriations." *Id.* at § 450j-1(b). During the FYs at issue, congressional appropriations fell far short of the contracting tribes' CSC requests. Thus, IHS could spend only as much money as Congress appropriated for that purpose.

Despite Congress's clear expression of intent, the Board held that the Secretary had a mandatory duty to provide full immediate funding of the Nation's CSC request, despite appropriation shortfalls. Because the Board failed to recognize the conditional nature of the Tribe's right to CSC funding, however, its decision was premised on a fundamental misunderstanding of the law.

Indeed, this Court and two other appellate courts have held that §450j-1(a)(2)'s requirement that there "shall be added to the [Secretarial amount] contract support costs," is qualified by the "notwithstanding any other provision" and "subject to the availability of appropriations" language of § 450j-1(b). *Oglala*, 194 F.3d at 1378; *see also Shoshone-Bannock*, 279 F.3d at 664-65; *Ramah*, 87 F.3d at 1345. As this Court declared in construing the provision, "[t]he language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" *Oglala*, 194 F.3d at 1378. Explaining its reasoning, the Court stated that "[t]he clause preceding this limitation, '[n]otwithstanding any other provision in this subchapter,' further clarifies that other statutory language in the ISDA relied upon by Oglala, *see, e.g.*, § 450j-1(f) ('Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection(a)'), cannot trump this express restriction on ISDA funding." *Id.* Thus, the Court concluded, "in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program." *Id.* Moreover, the court held, Oglala's interpretation "would render the subject-to-appropriations language of § 450j-1(b) meaningless." *Id.*

Oglala involved a tribe's challenge to the Department of the Interior's Bureau of Indian Affairs ("BIA") method of handling a shortfall in CSC funding for fiscal year 1995. Congress had appropriated a lump sum of $1.5 billion to BIA "of which not to exceed $95,823,000" was to be used for payments of CSC." In light of the statutory cap, BIA implemented a plan to allocate the available CSC funds on a *pro rata* basis. Under BIA's policy, Oglala received only 91.74% of its CSC. The tribe appealed the contracting officer's denial of full funding to the IBCA, and the Board ruled for Oglala, following its previous decision in *Alamo/Miccosukee*, *supra*. The IBCA held that under *Alamo/Miccosukee*, the tribe had an entitlement to full CSC funding under the ISDEA, despite the specific cap in the appropriations act.

In reversing the IBCA's decision in *Oglala* and the companion case in *Miccosukee* (*see* n. 15 *supra*), this Court noted that other sections of the ISDEA also indicate congressional intent to make funding under the Act subject to the availability of appropriations. The panel observed (194 F.3d at 1378):

> For example, § 450j(c) sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations." Likewise, the model contract set out in the ISDA, which is contained or incorporated by reference into each self-determination contract under the ISDA, specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement . . . . *Id*. § 450*l*(c).

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

Unlike the BIA, IHS's annual appropriations acts did not place a cap[17] 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. Nevertheless, the decisions in *Oglala* and *Ramah* compel the conclusion here that the Cherokee Nation never had an unconditional right to full CSC funding because both the statute and the Tribe's compact and AFAs with IHS made the funding subject-to-the-availability-of-

[17]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.

appropriations. Indeed, the Ninth Circuit in *Shoshone-Bannock* recently found "no basis for departing from [its] two sister circuits that have reached the same conclusion" even though the IHS appropriation act under examination there contained no express statutory cap. 279 F.3d at 667. As the Ninth Circuit explained, "[b]ecause of the express language subjecting provision of [ISDEA] funds to 'availability of appropriations,' and the clear statement that this limitation applies 'notwithstanding any other provision in this Act,' Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it." *Shoshone-Bannock*, 279 F.3d at 664-65 (footnotes omitted).

Shoshone-Bannock is virtually indistinguishable from the case at bar. In that case, the plaintiff tribes brought suit against IHS alleging both a statutory and contractual entitlement to full CSC funding for new or expanded self-determination contracts in FY 1996 (one of the fiscal years also involved here). Specifically, the tribes challenge involved "whether the Indian Health Service can limit its expenditures on contract support costs to the $7.5 million [ISD Fund] or whether it has to use whatever it takes of its entire $1.7 billion appropriation." 279 F.3d at 668. The district court had agreed with the tribes' arguments that the $1.7 billion lump-sum appropriation was "available" and ordered that IHS pay plaintiffs additional

CSC funding.[18] The Ninth Circuit reversed, holding, as noted above, that the language of § 450j-1(b) is "express" and "clear." 279 F.3d at 664, 665. The appeals court therefore concluded that "the only substantial issue in the case [was] whether Congress did or did not appropriate the money." *Id.* at 665. After examining the language of the FY 1996 appropriations act and the House Appropriations Committee Report,[19] the Ninth Circuit reasoned that "$7.5 million was all [Congress] wanted to spend" on CSC for new and expanded contracts. *Id.* at 666. The court therefore held that in light of "the statutory language subjecting contract support costs to 'availability of appropriations,' and saying that this limitation applies '[n]othwithstanding any other provision in this Act[,]' . . .[t]here is simply no Indian Health Service obligation to fund contract support costs beyond the appropriations made available for that purpose." *Id.* at 667 (footnotes omitted).

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[18] *Shoshone-Bannock Tribes v. Shalala,* 58 F. Supp. 2d 1191 (D. Or. 1999), *rev'd sub nom. Shoshone Bannock Tribes v. Thompson*, 279 F.3d 660 (9th Cir. 2002).

[19] As discussed previously (*supra* at 8-9 & n.8), the appropriations acts for each of the fiscal years at issue in this case, 1994-1996, contained nearly identical language.

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

Other language in the ISDEA further supports the Secretary's argument that the Cherokee Nation has no unconditional right to full immediate CSC funding. Rather, the ISDEA makes it clear that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b). Indeed, where a "self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the [contracting] tribal organization," the ISDEA directs the Secretary to "take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract." *Id.* at §450j(i)(1). The Board therefore erred in holding that the Secretary was required to "fully fund the mandatory CSC contracts first" (Add. 26). There is simply no requirement in the ISDEA that CSC be paid in full, ahead of other IHS programs or activities serving other tribes, and despite shortfalls in funding. The Cherokee Nation is therefore not entitled to additional CSC for either their newly-contracted programs or their ongoing programs.

Although the ISDEA requires that CSC "shall be added to" the Secretarial amount, §450j-1(a)(2), the Act also makes clear that "[n]otwithstanding any other provision" in the Act, the Secretary's obligation to fund self-determination contracts, including CSC, "is subject to the availability of appropriations" *and* "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b). *See also id.* at § 450j(g) (Secretary is prohibited from making "any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals").

IHS is thus required to use its lump-sum appropriation to: (1) continue funding programs for non-contracting tribes at the same level; (2) fund contracting tribes no less than the amount the Secretary would have spent to provide the program, including administrative costs; and (3) add funds for costs over and above these program costs that, by definition, were not previously incurred by the Secretary. Because of these competing claims and chronic appropriations shortfalls, the Secretary decided to follow Congress's recommendations in the committee reports as to how much Congress believed IHS should spend on new CSC. Allocating new CSC requests in accordance with IHS' priority list is an orderly and equitable way to distribute the agency's limited resources, without

reducing funding to other tribes or programs. Because the Secretary's solution is reasonable, and is consistent with IHS's responsibilities under the ISDEA, it should have been upheld by the Board.[20]

The Board concluded, nevertheless, that IHS could not "place its reliance on informal limitations in Committee report language"(Add. 27).[21] In the Board's view, the controlling question was "whether the appropriations as enacted were or were not subject to statutory restrictions, and in this case they were not. They were unearmarked, uncapped, lump sum, increased-amount appropriations. Therefore,

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[20]Moreover, neither the Cherokee Nation nor the Board disputed that the $7.5 million for new CSC had been spent, nor did the Tribe challenge the order of its placement on the queue. In *Shoshone-Bannock*, the district court granted summary judgment to plaintiffs on the theory that unless IHS proved that paying the tribes' full CSC request would reduce availability of funds to other tribes, IHS had to use its general FY 1996 $1.7 billion appropriation, not just the $7.5 million, to cover CSC. The Ninth Circuit dismissed this notion, stating that it made no difference that IHS did not submit any evidence showing that paying more to plaintiffs would reduce the availability of money to other tribes because ,"[i]t is undisputed that there is nothing left of the $7.5 million. . . . The $7.5 million is all gone, so it does not matter whether funding for other tribes would be reduced by allowing more [CSC] in this case." 279 F.3d at 667.

[21]While the Board was correct in stating (Add. 27) that indicia in committee reports and other legislative history do not establish any legal requirements on an agency, it would be unwise for an agency to ignore such recommendations. As the Supreme Court has observed, "we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

adequate funds were readily available for CSC distribution, and the Cherokee Nation is entitled to its full contractual share" (Add. 27).

In essence, the Board found that there was no limit on the availability of appropriations to pay CSC either for new or ongoing (existing) contracts because: (1) funds were "legally available" to IHS from IHS's lump-sum appropriation, and (2) congressional appropriations did not cap funding for CSC. Thus, the Board reasoned, IHS's duties were "ministerial" and the Secretary had no discretion in the matter (Add. 27). In so holding, the Board cited its earlier decision in *Alamo*/*Miccosukee*, *supra*; and the D.C. Circuit's decision in *Ramah*.

But *Alamo*/*Miccosukee*, which was reversed in part by this Court,[22] is based on the same flawed analysis of the statutory language employed by the Board here, and *Ramah* actually supports the Secretary's position. In *Ramah*, the D.C. Circuit stated that "an insufficient appropriation fails to excuse an agency from its obligation to follow as closely as possible the allocation plan Congress designed in anticipation of *full* funding." 87 F.3d at 1348. There, the appropriations act itself was silent on how to distribute the shortfall in CSC funding, and the D.C. Circuit relied on the legislative history to glean the intent of the 1995 Congress that a *pro rata* reduction was intended. *Id.* at 1348-49. In contrast here, neither the appropriations statutes

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[22]See the discussion *supra* at 32 & n. 15.

nor the legislative history specifically address the problem of shortfalls. Rather, the legislative history demonstrates that Congress believed that only the amounts earmarked in appropriation committee reports should be made available for CSC.[23]

Further, although *Ramah* held that the BIA's proposed allocation method violated the ISDEA, the decision nevertheless accepts the premise that the funding of CSC under the Act is limited to the amount of available appropriations and that an agency is not required to dismantle other important health care programs to obtain additional funds to fully pay CSC. The court thus explained that "[e]ven though the ISDA speaks of a Tribe's 'entitlement' to certain funds, the Secretary cannot be forced to take money from a program serving a Tribe (for example, from the federally-funded 'programs' for which [CSC] is to cover administrative costs) in order to make up for a [CSC] appropriations shortfall." 87 F.3d at 1345. In other words, § 450j-1(b) "mean[s] precisely what it says," the Secretary need only distribute the amount of money appropriated by Congress, "*and need not take money intended to serve non-[CSC] purposes under the ISDA in order to meet his responsibility to allocate [CSC]*." *Id.* (emphasis added).

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[23]Moreover, as noted earlier (*supra* 35 n.18), the district court's decision in *Shoshone-Bannock*, also relied on by the Board, has been reversed.

Here, the Board rejected the Secretary's arguments that requiring IHS to pay the Tribe additional CSC would impair its ability to discharge its responsibilities with respect to other tribes and individual Indians, stating that the IHS may not "withhold or reduce mandatory funds to meet other, discretionary, needs" (Add. 26). The Board further stated that IHS failed to provide adequate or convincing proof "that any actual reduction of funds for other tribes would be required" (Add. 26). The Board again erred, however, because as we have discussed, IHS's responsibility to fund other programs and activities from its lump-sum appropriation is equally mandatory, not discretionary. Moreover, IHS's Deputy Financial Manager, referring to a table projecting reductions in Service Area budgets if full CSC were paid to all contracting tribes, explained that "to fully fund all of the CSC requests nationwide, the IHS would have to use monies from other budget activities within the Services Appropriations that fund the recurring operations of various IHS Area offices and Service Units." Cesari Decl. ¶2 & Ex.1 (JA Vol. II 449, 458). Such reductions would cause a decrease in base funding for the IHS Area Offices and Service Units, including medical, dental and mental health services. The Board denied the government's request for a further evidentiary hearing to provide further proof in support of this argument (Add. 27).

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

The ISDEA requires that "[e]ach self-determination contract entered into under the [Act] shall . . . contain, or incorporate by reference, the provisions of the model agreement described in [§ 450*l*(c) of the Act.]" 25 U.S.C. § 450*l*(a). The model agreement states with respect to funding: "*Subject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement [negotiated by the parties]." *Id*. at §450*l*(c)(Model agreement, sec. 1 at ¶(b)(4)) (emphasis added). The Board's decision ignores these statutory provisions, however, in holding that the Cherokee Nation is entitled to receive full CSC funding in this case.

When the Cherokee Nation entered into its compact with the government, the Tribe agreed to the statutory limitations described in § 450*l*(c). *See* Compact of Self-Governance Between the United States of America and the Cherokee Nation, art. IV, sec. 3 (June 30, 1993) (JA Vol. I, tab 5 at 73) (the Secretary shall provide funding "[s]ubject only to the appropriation of funds by the Congress of the United States . . ."). Cherokee's AFAs for FYs 1994, 1995 and 1996 also contained language specifically acknowledging that adjustments may be necessary due to "congressional action." FY 1994 AFA, sec. 7; FY 1995 AFA, sec. 10; FY 1996 AFA, sec. 10 (JA Vol. I, tab 11 at 171; tab 18 at 277; tab 23 at 345). IHS's contractual obligation to

fund the Nation's CSC request was therefore contingent on the availability of appropriations, and the Tribe's request was placed on IHS's priority list in accordance with agency policy.

IHS distributed the $7.5 million ISD Fund each of the FYs at issue here on a first-come, first-served priority basis. Each tribal request for CSC for new or expanded contracts was placed on the priority list and paid according to its place on the list until the $7.5 million for the FY was exhausted. When new ISD funds became available the next FY, IHS was able to continue to pay CSC to tribes with outstanding requests on the queue until that FY's ISD funds were also exhausted. Cesari Decl. ¶3 (JA Vol. II 449-50). Because the Tribe's CSC requests were too far down on the priority list, Cherokee did not receive additional CSC for its programs.

Thus, the Tribe cannot claim any contractual right to funding of its CSC beyond available appropriations. In rejecting the same argument made by the plaintiff tribe in *Shoshone-Bannock*, the Ninth Circuit declared: "But the language in its contract expressly precludes an independent claim on that basis. It says that the Secretary's obligation is 'subject to the availability of appropriations.'" 279 F.3d at 952. Thus, "[a]ny contractual claim that the tribe might make is vitiated by the fact that none of the $7.5 million was available at any relevant time." *Id.* at 668. Further, any expectation by the Nation to receive full CSC funding here was not

reasonable. *See Oglala*, 194 F.3d at 1380 (tribe's expectation to receive full CSC funding was not reasonable in light of the subject-to-availability-of-appropriations language in § 450j-1(b) and in the model contract, § 450*l*(c)). Moreover, the Nation contracted with knowledge of the historical under-funding of CSC by Congress, and that the queue was IHS's mechanism for dealing with those shortfalls. Thus, the Board was wrong in concluding that the Tribe had a contractual right to full CSC funding.

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

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

earmarked $134,686,000, $145,738,000, and $153,040,000 for ongoing CSC for FYs 1994, 1995, and 1996, respectively, in committee reports. The appropriations for CSC for each of those fiscal years has been distributed, and no CSC remain for those fiscal years. Fitzpatrick Decl. ¶¶¶ 6, 7, 8) (JA Vol. II 426).

The Board therefore erred in holding that Section 314 is inapplicable here. As the Ninth Circuit, the only appellate court to have construed Section 314, has announced: "[Section] 314 is unambiguous. Congress plainly said that the appropriated amounts were the total amounts available." *Shoshone-Bannock*, 279 F.3d at 668.

A discussion of the backdrop against which Section 314 was enacted provides further insight into Congress's intent. As tribes assumed greater responsibility for operating health care programs in the 1990s, their requests for CSC correspondingly escalated. *See, e.g.*, S. Rep. No. 105-227, at 51-52 (1998) (expressing concern over escalating CSC requests). Not surprisingly, litigation over CSC, like the instant case, also increased. Section 314 was enacted in the wake of a series of judicial decisions which held IHS and the BIA liable for the full amount of CSC requested by the plaintiff tribes for new or expanded programs. *See* S. Rep. No. 105-227, at 52 (noting that the demand for CSC funding had increased and that "in several cases the Federal courts have held the United States liable for insufficient CSC funding").

These holdings[24] were contrary to Congress' intent that the total IHS funding for such new CSC be restricted to the $7.5 million earmarked in the committee reports and appropriated in the appropriations statutes, and contrary to the statutory and contractual language which conditioned all self-determination contract funding on the availability of appropriations.

Section 314 was directed at these decisions and expressly limited the availability of CSC funding for new and expanded self-determination contracts to total amounts which could not exceed $7.5 million. *See* S. Rep. No. 105-227, at 91-92 (1998) (acknowledging that several courts had held the United States liable for insufficient contract support cost funding, and expressing "concern[] about continuing and growing funding shortfalls in contract support costs"). Congress directed IHS, in cooperation with the Tribes, to develop a proposal for the equitable distribution of contract support through fiscal year 2000. 144 Cong. Rec. H11044, H11382 (daily ed. Oct. 19, 1998). However, Congress underscored its intent that

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[24]Two district courts had held that the $7.5 million earmark was not a cap on available CSC, and that absent a showing of harm to other tribes, IHS must provide a tribes' request for full CSC funding. *See Shoshone-Bannock* , 58 F. Supp. 2d 1191, *rev'd,* 279 F.3d at 667-68; *California Rural Indian Health Bd. v. Shalala*, No. C-96-3526-DLJ (N.D. Cal. July 13, 2001); *cf. Miccosukee, supra* (IBCA held that tribe was entitled to money damages totaling 100% of its new CSC despite express statutory cap on CSC contained in BIA appropriation for FY 1994), *rev'd*, *Babbitt v. Miccosukee Corp*., 217 F.3d 857 (Fed. Cir. 1999) (table, text available in Westlaw, 1999 WL 989060).

funding for CSC be limited and should not be obtained by depriving programs of their operational funding (*e.g.*, base funding of self-determination contracts and funding for direct health service programs that had not been the subject of self-determination contracting by Tribes), stating that "[t]he remedy cannot be a large infusion of additional funding for contract support costs at the expense of either critical health programs or critical construction needs of the Service." 144 Cong. Rec. at H11382.

Section 314, by its plain terms, unequivocally prohibits IHS from disbursing more than a maximum total of $7.5 million each year to tribes for CSC for their new and expanded programs from 1994 through 1998. It indicates that the amount earmarked in committee reports for Public Laws 103-138, 103-332 and104-134, *i.e.*, "$7,500,000 . . . for the transitional costs of initial or expanded tribal contracts" in 1994, 1995, and 1996, respectively, shall be "*the total amounts* available" for those years "for such purposes." Section 314 (emphasis added); Pub. L. No. 103-138, 107 Stat. 1379, 1408; 103-332, 108 Stat. 2499, 2528; Pub. L. No. 104-134, 110 Stat. 1321-189. This restriction applies "notwithstanding any other provision of law." Section 314. In other words, it supersedes *any* provision in the ISDEA that allegedly requires IHS to pay contracting tribes more than a total of $7.5 million per year for new CSC. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (the word "'any' has

an expansive meaning" and "must [be] read . . . as referring to all"); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) (The word "'any' means all"). By the same token, Section 314 similarly prohibits IHS from paying CSC above the amounts earmarked in committee reports in FYs 1994, 1995 and 1996 for ongoing self-determination contracts.

Furthermore, the concept of "availability" in Section 314 is consistent with the language of the ISDEA itself, which repeatedly states throughout that funding under the Act is "subject to the availability of appropriations." 25 U.S.C. §§ 450j-1(b), 450j(c); *see also id.* at 450*l*(c) (Model agreement, sec. 1 at ¶(b)(4)). Section 314 unmistakably dictates that the $7.5 million annual allotments set forth in the committee reports, whether already spent or not as of 1998 (when Section 314 was enacted), "are the total amounts available" for such purposes (*i.e.*, new CSC funding) in each year in question. Similarly, the amounts earmarked to fund CSC for existing contracts ($134.6 million in FY 1994; $145.7 million in FY 1995; and $153 million in FY 1996) are the total amounts available for that purpose. Thus, the Act conditions the amount of funding under self-determination contracts upon "the

availability of appropriations," and Section 314 defines what amounts of appropriations "are available."[25]

There is no merit to the Cherokee Nation's suggestion, endorsed by the Board in its decision, "that Congress was simply prohibiting the future use of unspent appropriated funds for the 5 prior years as a budgetary measure" (Add. 21). Such a construction is linguistically illogical. If Congress had simply meant to bar the expenditure of unspent funds, it could have said so directly. As the *Shoshone-Bannock* court stated in rejecting the same argument made by the tribes in that case, "Congress plainly said that the appropriated amounts were the total amounts available. Congress did not say that it meant only to restrict the Secretary's authority to unobligated balances." 279 F.3d at 668.

Indeed, given its knowledge of the litigation involving the shortfalls in CSC funding, Congress was presumably aware that IHS had already exhausted the amounts earmarked in committee reports for its 1994, 1995, and 1996 CSC funding when it enacted Section 314 in October 1998. Thus, Section 314 would have been

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

superfluous if it were intended to target unspent prior funding. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage"). Because the language of "[Section] 314 is unambiguous," it thereby forecloses the Nation's claims. *Shoshone-Bannock*, 279 F.3d at 668; *see Oglala*, 194 F.3d at 1378 (when the words of a statute are unambiguous, judiciary inquiry is complete).

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

In holding that Section does not apply in this case, the Board suggested that to hold to the contrary would repudiate the Nation's right to compensation for contractual work already performed (Add. 16, 17). In other words, the Board opined that the government is liable in damages even when Congress, by statute, repudiates contractual obligations. However, no vested rights were repudiated by Section 314.

As discussed earlier, when the Tribe contracted with IHS, its right to payment was, under the terms of the compact and AFAs themselves, and the terms of the authorizing statute, subject to the availability of appropriations. The ISDEA and the contract alike thus reserved to Congress the power to deny the Tribes of any payment by exercise of its right not to appropriate funds. Here, Congress has done no more than exercise that power, which it expressly reserved by statute and in the contract. *See OPM v. Richmond*, 496 U.S. 414, 425 (1990) ("[a]ny exercise of a power granted

by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury").

Clearly, IHS's "ability . . . to bind the Government contractually was expressly conditioned on the availability of appropriations." *See Oglala*, 194 F.3d at 1379. Further, a tribe's obligation to administer a self-determination contract is also conditioned on the "availability of appropriations." 25 U.S.C. § 450*l*(c) (Model agreement, sec. 1 at ¶ (c)(3)).

Finally, Section 314 simply clarifies Congress' intent in the ISDEA.[26] As explained above, the Secretary was not required to fund CSC fully even before Section 314 was enacted, since doing so would have required him to take funds from existing programs. Because Section 314 merely clarifies Congress' intent, it does not deny the Tribes a fixed "right," since the Tribe never had a fixed right to have the statute read in a particular way. *See Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d

[26] *Cf. Shoshone-Bannock*, 279 F.3d at 666-67. The appeals court there held that Section 314 "eliminated retroactively" any ambiguity in the language of the 1996 appropriations act that $7.5 million "'shall remain available until expended.'" *Id.* The court opined that "[o]nce Congress thus provided that $7.5 million was the 'total amount [] available,' there could no longer be a serious question whether the remaining $1.7 billion was also available for this purpose." *Id.* (footnote omitted). The court further noted that Congress may enact retroactive laws if it does so "expressly and clearly," and held that Section 314 is a clear expression of congressional intent. *Id.* at 668 (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994)).

1259 (9th Cir. 1997) (where Congress simply clarified the meaning of a statute in the midst of litigation over the statutory meaning, plaintiffs never had a fixed "right" to have the statute read their way), *cert. denied*, 525 U.S. 928 (1998); *Oglala*, 194 F.3d at 1380 (rejecting tribe's estoppel claim because the subject-to-the-availability-of-appropriations language in §450-1(b) and in the model contract, §450*l*(c), "precludes a finding that Oglala's reliance was reasonable"); *cf. Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53 (1986) ("Congress reserved the authority to amend not only [the Social Security Act, 42 U.S.C.] § 418 but also Agreements entered into 'in conformity with' that section.").

B. Payment Of Plaintiff's Claims Would Violate The Appropriations Clause.

The Constitution vests Congress, and Congress alone, with the power to direct the expenditure of funds from the Treasury. Art. I, § 9, Cl. 7 ("[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *Richmond*, 496 U.S. at 416 ("payments of money from the Federal Treasury are limited to those authorized by statute"). Adherence to this requirement "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 428. Here, where Congress enacted a statute that specifies how appropriated money should be

spent, and the statute declares that the Secretary is not required to *reduce* funding for other programs in order to fund ISDEA contracts, the Appropriations Clause bars the payment of any funds to the Tribe beyond that amount.

Congress could not have spoken more plainly in Section 314 – "[n]otwithstanding any other provision of law" the amounts appropriated for CSC payments are "the total amounts available" for such purposes in FYs 1994 through 1998. Because Congress limited its appropriations for the payment of new CSC to $7.5 million for FYs 1994, 1995, and 1996, "[a]ny contractual claim that the tribe[s] might make is vitiated by the fact that none of the $7.5 million was available at any relevant time." *Shoshone-Bannock*, 279 F.3d at 668. For a tribunal to order the payment of money for additional CSC despite Congress's admonition that "that's all there was" would, under these circumstances, usurp Congress's power under the Appropriations Clause.

C. <u>Section 314 Also Bars Payment From The Judgment Fund</u>.

Finally, despite the Board's holding to the contrary (Add. 21), Section 314 also bars payment of CSC to the Tribe from the Judgment Fund, 31 U.S.C. §1304. Section 314 states that "[n]otwithstanding any other provision of law," the amounts appropriated in the spending bills for fiscal years 1994-1998 are the total amounts available to fund CSC in those years. This sweeping language supports the

Secretary's position that Congress intended that those amounts, and only those amounts, be available to fund CSC in those FYs. *See Illinois Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) ("'notwithstanding' language of the statute really could not be clearer").

The Supreme Court has said that the Judgment Fund "does not create an all-purpose fund for judicial disbursement . . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Richmond*, 496 U.S. at 432; *accord Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 95 (1992) (Rehnquist, C.J.) (for the Court) (payment of a money judgment must be based "'on a substantive right to compensation based on the express terms of a specific statute'") (quoting *Richmond*, 496 U.S. at 432). Because the Tribes' right to CSC payments was *conditioned* on available appropriations, and because Section 314 eliminates any appropriation for CSC payments in excess of earmarked sums, there is no right to those payments under the terms of a specific statute within the meaning of *Richmond*. *See* 496 U.S. at 425 ("'[t]he difficulty in the way [of execution of a judgment against the United States] is the want of any appropriation by Congress to pay this claim'") (citation omitted).

CONCLUSION

For the foregoing reasons, the Board's order granting summary judgment in favor of the Cherokee Nation should be reversed by this Court.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
(202) 514-2541

____
JEFFRICA JENKINS LEE
(202) 514-5091
Attorneys, Appellate Staff
Civil Division, Room 9546
Department of Justice
601 D St., N.W.
Washington, D.C. 20530-0001

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