

No. 08-2262
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable Senior Judge C. LeRoy Hansen

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ARGUMENT

The government's brief fails to deal with the two central issues presented in this appeal, namely (1) the Supreme Court's directly controlling declaration in *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637 (2005), that the government's liability to a contractor remains undisturbed "even if [the] agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made," and (2) the actual statutory language Congress chose to use in ISDA.

Taking each of these points seriously, as the government chooses not to do, is not a matter of "exalt[ing] form over substance", Gov't Brf. 39, but of simply paying close attention to what both the Supreme Court and the Congress have said about the government's liability under ISDA.

I. ***CHEROKEE NATION* CONTROLS THIS CASE.**

The government rests its defense on the language of section 450j-1(b), which states that "the provision of funds . . . is subject to the availability of appropriations. . . ."

The government does not dispute that this "availability of appropriations" clause is a term of art that has a long pedigree and a very

specific meaning in federal appropriations law. It does not dispute that whether an appropriation is “available” to pay a given obligation is judged under the time-purpose-amount test. I GAO Redbook 4-6 (2004) (Aplt. Brf. 24-25). It does not dispute that this term of art has the same meaning in the context of the ISDA appropriations and the ISDA contracts at issue in this case as it has in any other appropriation and contract setting.¹ And it does not dispute—although remarkably it also utterly ignores—that in *Cherokee* the Supreme Court has already held, in the specific context of ISDA, that when an appropriation is sufficient to fully pay any specific contract, the government is liable for failing to pay that contract in full, notwithstanding—*precisely* as was the case here—that the very appropriation is “insufficient to pay all the contracts the agency has made.”

¹ The government errs in asserting that *Newport News Shipbuilding & Drydock Co.*, 55 Comp. Gen. 812 (1976), did not involve a capped appropriation equivalent to “not to exceed”, Gov’t Brf. 33 n. 9; it plainly did. 55 Comp. Gen. at 822 (construing Appropriations Act’s language “FOR THE DLGN NUCLEAR POWERED GUIDED MISSILE FRIGATE PROGRAM, \$244,300,000” as a limit on the total amount that could be spent from the appropriation for that program). *See also* II GAO Redbook at 6-29 (2006) (“Words like ‘not more than’ or ‘not to exceed’ are not the only ways to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as ‘for renovation of office space, \$100,000’), then the appropriation establishes a maximum that may not be exceeded”) (citations omitted).

543 U.S. at 637-638, *citing Ferris v. United States*, 27 Ct. Cl. 542 (1892).
See also Dougherty v. United States, 18 Ct. Cl. 496 (1883).

The *Ferris* Rule, a longstanding bedrock of federal appropriations law, whose citation by the Supreme Court in *Cherokee* underscores its modern day vigor, controls this case. But instead of grappling with *Cherokee's* reliance on *Ferris* specifically in the ISDA context, the government comes up with an array of arguments that go nowhere.

For instance, the government asserts that in *Ferris* the contract at issue did not include an “availability” clause (Gov’t Brf. 40). But the government does not explain why that makes a difference, given that the Supreme Court in *Cherokee* fully endorsed the *Ferris* Rule in the context of ISDA contracts that do have such a clause.

The government also asserts that *Ferris* involved “multiple projects connected to improving the Delaware River” whereas this appropriation only involves “ISDA contract support costs” (Gov’t Brf. 40). In so doing, the government is playing a word game, apparently hoping to make the ISDA appropriation at issue here sound more like a single purpose appropriation for a single contractor, of the sort at issue in *Sutton v. United States*, 256 U.S. 575 (1921), and thus outside the *Ferris* Rule.

But that word game is like saying the appropriation at issue in *Ferris* was simply a single Delaware River improvement project. The truth is that, just as *Ferris* involved many contractors and contracted projects, each ISDA appropriation here “bulked together hundreds of contracts” with Indian Tribes, *D. Ct. opinion* 13, Aplt. Brf. Addenda A-13, ranging from small scholarship programs to entire police forces spread across 35 States.

Next the government argues that “notice” should make a difference in how the “availability” term of art is interpreted. Gov’t Brf. 40-42. But that formulation is a recipe for disaster across the entire landscape of government contracting, and would only lead to secondary litigation about how much notice is enough notice when faced with a bulk lump-sum appropriation.

Moreover, the tribal contractors did *not* know the appropriation would be insufficient to pay all contractors. At best, in some years the contractors were told it *might* prove to be insufficient, but no contractor was told how much it would actually be paid until the work was done. Some contractors eventually received a pro rata share, while others received 50%. *See Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1336, 1342 (D.C. Cir. 1996). In 2006 the Secretary changed his system altogether so that now contractors

are receiving vastly different percentage payments.² Contractors are at the Secretary's whim, which is precisely why the *Ferris* Rule was developed and why the government's formulation must fail.

This is also why a single contractor line-item appropriation of the kind at issue in *Sutton* and related cases is precisely the kind of appropriation that *does* relieve a contractor from the uncertainties of an agency's allocation and spending priorities, and whose content *is* chargeable to the contractor. Aplt. Brf. 28-29. But that is not the only way for the government and contractor to play on a level field. Gov't Brf. 41. For example, if a lump-sum appropriation declares that each contractor will receive 80% of its contract support entitlement, such a provision meets the concerns expressed in *Ferris* and *Dougherty*: each contractor has notice of the precise amount it will be paid and can adjust its performance (unlike the situation presented here). Or if the appropriation incorporates by reference a payment plan setting forth specific sums to be paid to each contractor, that too would satisfy the concerns that underlie *Ferris*.

² See BIA Contract Support Costs Policy (May 8, 2006), available at http://ncai.org/ncai/resource/data/docs/Contract_Support_Policy_May8_2006.pdf ; BIA FY 2007 CSC Shortfall Report (draft), available at <http://ncai.org/Contract-Support.36.0.html> . See also BIA FY2007 Actual CSF Distribution, available at <http://ncai.org> under "Policy Issues" > "Contract Support" > "Contract Support Costs Data".

But what cannot be done, consistent with a contractor's rights and the *Cherokee-Ferris* Rule, is to limit the contractor's rights to whatever sum a government agent simply decides to pay after the fact, from zero to 100% or some other number. Again, that is the very formulation that leaves the contractor at the whim of a government agent and thus defeats the entire concept of a contract. Aplt. Brf. 32-34.

Ultimately, the government here, just as in *Cherokee*, is seeking unconventional relief from the consequences of hornbook federal contract and appropriations law. And just as the Supreme Court's decision reflects in *Cherokee*, the government's arguments threaten to push appropriations law into dangerous territory—for the government's overall reliability as a contracting partner (and the industries which contract with the government) depend upon a single well-understood set of principles for fixing contractors' rights on a predictable and enforceable basis. Aplt. Brf. 33.

Congress can certainly use an "availability" clause to limit an agency's liability to pay a contractor to a given sum, while also respecting the contractor's right to be paid a sum certain. But only Congress can do so, and thus curtail the contractor's right to be paid all that the contractor bargained to receive, by putting the contractor on clear notice of the precise lesser sum he will be paid for the work he has contracted to do before he

does it. *Ferris*, as reconfirmed in *Cherokee*, permits nothing less. And in an era of massive allocations within larger appropriations to cover contracted work to be performed both domestically and overseas, that is the only rule that provides the certainty necessary to the integrity of the contracting process.

While the government chooses simply to ignore it, the Supreme Court has spoken on the controlling issue in this case. It has said that liability attaches if an appropriation is sufficient to pay a contractor, and that “the Government normally cannot back out of a promise to pay on grounds of ‘insufficient appropriations,’ even if the contract uses language such as ‘subject to the availability of appropriations,’ and even if an agency’s total lump sum appropriation is insufficient to pay all the contracts the agency has made.” *Cherokee*, 543 U.S. at 637-638. While the Court’s holding regarding an appropriation insufficient to pay “*all*” contracts may have addressed facts not present in *Cherokee*, “once the [Supreme Court] has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). This Circuit has made clear that it considers itself “‘bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.’”

Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1243 (10th Cir. 2008), citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (adding “our job as a federal appellate court is to follow the Supreme Court’s directions, not pick and choose among them as if ordering from a menu”).

In this case, the Supreme Court’s clear invocation of the *Ferris* Rule in the ISDA context controls, and the *Ferris* Rule requires reversal of the judgment below.

II. THE SECRETARY’S CONTRACT AUTHORITY IS REFLECTED IN ISDA’S KEY PROVISIONS.

A. The Government Ignores ISDA’s Key Contract-Obligating Provisions.

Even if this case is not resolved by the principles of appropriations law set forth in *Cherokee* and *Ferris*, ISDA yields the same result. The best reading of the statute and the meaning of ISDA’s “availability” clause is that it limits the ability of the Secretary to pay tribal contractors, but it does not limit the contract obligation itself. Thus, if the Secretary is constrained by insufficient appropriations from paying the full contract amount, the result is that the United States has breached its contract and is liable in damages for that breach, not that the obligation of the United States under the contract has been retroactively diminished.

Perhaps no single provision of ISDA is more important to the case at hand than 25 U.S.C. § 450j-1(g), declaring in unmistakable terms that the Secretary “shall add to the contract the full amount of [CSC] funds to which the contractor is entitled [under § 450(a)(1)].”

But instead of reconciling its reading of ISDA to this critical section, the government simply ignores it. That is not merely failing to examine statutory language “in context,” *United Keetoowah Band of Cherokee Indians v. United States*, --- F.3d ---, 2009 WL 1575196*6 (10th Cir. 2009); it is not examining the language at all. The government’s omission is particularly acute since § 450j-1(g) was enacted six years after § 450j-1(b), and “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995).

Thus the task is to reconcile § 450j-1(g)’s statement that “full” contract support costs “shall be added” to each contract, with § 450j-1(b)’s statement that the Secretary’s “provision of funds” is “subject to the availability of appropriations.” The task is not difficult.

Each contract includes a government obligation to pay full CSC, but the Secretary’s legal duty to “provi[de]” that full amount is contingent on

there being “available” appropriations to do so.³ If the appropriations are not “available,” the Secretary cannot “provide” the funds to the contractor, *i.e.*, pay the full contract price, but the government *still bears liability* for failing to meet its contract obligation to pay full CSC.

Another key provision of ISDA is § 450j-1(d)(2), which this Court considered in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997). This section states that “[n]othing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.” Congress could hardly have been more clear about its insistence that full CSC be paid.

But again, the government fails to reconcile its reading of ISDA to this critical section and instead, as with § 450j-1(g), simply ignores it. And again, a reconciliation of this provision with the “availability” language of § 450j-1(b) is easily accomplished: The Secretary does not have to provide funds he does not have, but such a shortage does not relieve him of the legal duty to fully fund each contract. So, unless the Secretary secures additional funds to pay the contractor in full, there is a breach of the Secretary’s duty to

³ This reading conforms with “[t]he plain meaning of ‘provide,’” which is “to supply, afford, contribute, make, procure, or furnish for future use.” *Central Midwest Interstate Low-level Radiation Waste Comm’n v. Pena*, 113

fully fund⁴ the contract, and the government is liable for damages.

In short, every provision of ISDA can be harmonized through a construction that recognizes a distinction between the government's contract obligation to pay full CSC, and the Secretary's ability to pay that sum from an insufficient appropriation. While the Secretary's ability to pay may be limited under the "availability" constraint of § 450j-1(b), the contractual obligation nonetheless remains, and the government is liable for any breach.

By contrast, the government's alternative construction is to read the "availability" limitation of § 450j-1(b) as a trump card that can, as a practical matter, convert the imperative language of § 450j-1(g) and §450j-1(d)(2), promising full funding of CSC, into no more than an illusion. That is not reconciling different statutory provisions; it is simply excising those the government disfavors.⁵

F.3d 1468, 1474 (7th Cir. 1997), *citing* Black's Law Dictionary 1224 (6th ed. 1990).

⁴ The words "to fund" may mean "to provide funds for" or "to convert into a debt" Merriam-Webster's Collegiate Dictionary (10th ed.). Only the second meaning harmonizes with the rest of § 450j-1(d)(2), since "the full amount of need" is the CSC amount which "shall be added" to the Secretarial amount under § 450j-1(a)(2) and § 450j-1(g).

⁵ The government also never discusses 25 U.S.C. § 1658 (enacted almost simultaneously with the 1988 ISDA amendments) or 25 U.S.C. § 2008(j)(2) or the many other statutes that demonstrate how, when Congress so chooses, it employs clear terminology to limit contract

The government does discuss section 1(b)(4) of the Model Contract set forth in § 450l(c). Gov't Brf. 28. But it ignores that provision's basic structure and grammar. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241-242 (1989).

The core of that section declares that the "total amount specified in the annual funding agreement" "shall not be less than the applicable amount determined pursuant to section 106(a)." That makes perfect sense in the model contract, for it echoes § 450j-1(g)'s command to add the "full amount of [CSC] funds" to each contract. The opening adverbial clause in section 1(b)(4), "[s]ubject to the availability of appropriations," then modifies what it is the Secretary "shall make available."⁶ So here, too, the model contract echoes another provision of the Act, namely § 450j-1(b)'s limitation on the Secretary's "provision of funds."

obligations to amounts appropriated. Aplt. Brf. 45-46. Perhaps it is because it is impossible to explain how ISDA's statement that the "provision of funds shall be subject to availability of appropriations" could possibly mean the same as "the authority of the Secretary [to enter a contract] shall be to the extent, and in the amount, provided in appropriation Acts" (§ 1658's language).

⁶ See, e.g., UMD ARC/Writing & Reading Center, *Parts of a Sentence* <http://www.umassd.edu/arc/wrc/handouts/partsofasentence.htm>

("An adverb subordinate clause functions like an adverb. Most often it modifies a verb, adjective, or an adverb. Many times it answers the questions, 'when, where, how, why, and under what condition?").

Contrary to the government's view of it, this plain meaning of section 1(b)(4) does not "render nugatory" any other provision of ISDA. To the contrary, as just noted, it places the section in harmony with all of the others. By contrast, the government's reading wipes out §§ 450j-1(g) and 450j-1(d)(2)—hardly a favored way to read an Act of Congress.

Here, the government's final play is to argue that the foregoing reading of section 1(b)(4) and of §§ 450j-1(g) and 450j-1(d)(2) somehow "renders nugatory" § 450j(c)(1)(B). Gov't Brf. 28. But that latter section, which provides that "The amounts of such contracts shall be subject to the availability of appropriations," is targeted, not at current-year ISDA contracts funded under § 450j-1(a) and § 450j-1(g), but at the future years of multi-year contracts authorized in § 450j(c), which are not at issue here. Aplt. Brf. 48-49. So it is the government's reading of ISDA that fails to respect (and often fails even to consider) all of the statute's provisions. And it is the plaintiffs' reading of the various statutory provisions which reconciles them all while giving effect to each. And that, of course, is the goal of statutory interpretation. *Wright v. Federal Bureau of Prisons*, 451 F.3d 1231, 1239 (10th Cir. 2006).

The result urged here is unremarkable. As the Supreme Court noted in *Winstar* and *Franconia*, once the government enters into a contract "its

rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (citation omitted); *Franconia Assoc. v. United States*, 536 U.S. 129, 141 (2002) (same). In that capacity, the government can no more breach a contract with impunity than can a private contractor, a proposition that applies with equal force even when the government’s breach flows from an insufficient appropriation. Even then, the government is answerable in damages for breach of contract.

B. The Government’s Reading of the Statute is Contrary to Congressional Intent.

The government’s misreading of the § 450j-1(b) “availability” proviso to reduce the contract amount (and not merely the Secretary’s “provision of funds”) not only does violence to the words of the statute; it defeats the central purpose of the 1988 and 1994 amendments to ensure stability of funding and full CSC. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 78 (1990); *RNSB v. Babbitt*, 87 F.3d at 1346 n. 10. If, as is the case here, another construction which advances these objectives is possible, it must be adopted. *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-177 (1994).

In § 450j-1(b) Congress spoke to the Secretary's duty to provide contract funds to ISDA contractors, while simultaneously protecting agency funding for Tribes that chose *not* to seek ISDA contracts with the Bureau. The government argues that the Secretary may unilaterally reduce the contract obligation to a contracting Tribe in order to protect the funding for non-contracting Tribes. That kind of construction simply butchers the Act while directly undermining Congress' intent to provide contracting Tribes with clear and enforceable contracts.

This view—that the proviso permits a reduction in the obligated contract amount itself—conflicts with § 450j-1(b)(2), which carefully specifies five circumstances under which a contract amount *can* be reduced. Congress did not include an insufficient “availability” of appropriations as a sixth such circumstance, and to read such a sixth exception into the statute would do violence to settled rules of statutory construction. *See United States v. Brown*, 529 F.3d 1260, 1265 (10th Cir. 2008) (“Under the doctrine of *expressio unius est exclusio alterius*, ‘to express or include one thing implies the exclusion of the other’”); *Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003) (same).

Congress enacted the 1994 amendments, Pub. L. 103-413, to remedy the failure of BIA (and IHS) to implement the 1988 amendments. S. Rep.

103-374, at 2-3, Appx. 730-731.⁷ It specifically amended § 450j-1(a) to ensure “that there would be no diminution in program resources when [programs] are transferred to tribal operation.” S. Rep. 103-374, at 9, Appx. 737. That report goes on to say: “In the absence of section 106(a)(2) [the CSC component], as amended, a Tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.” *Id.*⁸

Nowhere does the government explain how Congress’ clear intent to fully fund CSC can be achieved when the government claims the power under the “availability” provision to unilaterally diminish its CSC obligation. The government’s interpretation not only makes a hash out of the statutory language, but it is contrary to the congressional intent of ensuring that contracting Tribes receive full CSC payments and are not penalized by being forced to divert program monies to pay necessary overhead costs without any recourse. *See* Aplt. Brf. 16-17.

⁷ The government refers to “the tribes’ escalating demand for CSC,” Gov’t Brf. 12, shifting the blame to Tribes for the shortfalls. As the 1999 GAO report on CSC shows, indirect cost rates remained steady at about 25% for the ten-year period preceding that report. Appx. 506, 531. The CSC component of the ISDA contract is of course determined by the OMB A-87 methodology triggered once a Secretarial amount has been contracted, not by tribal requests. Appx. 506, 578-585; *RNC v. Lujan*, 112 F.3d at 1457.

⁸ *See* Aplt. Brf. 44-45, 52-53.

In the end, what is perhaps of paramount importance is that Congress intended to “maxim[ize] Indian participation in the direction of educational and other Federal services to Indian communities,” 25 U.S.C. § 450a, and to establish “a meaningful Indian self-determination policy.” Just as was the case the first time this action was before this Court, “[the government’s interpretation of the Act is unreasonable. Not only does its interpretation not benefit Tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts.” *Id.* at 1462.

C. The Judgment Fund Has Nothing To Do With This Case.

The government argues that if the contractors prevail, they will be securing payment of their contracts from the Judgment Fund, and it would have made no sense for Congress to have authorized ISDA contractors to secure recovery for unpaid CSC from the Judgment Fund because “. . . CSC would still have to be paid [back] out of money appropriated to the Secretary.” Gov’t Brf. 30 (citing 41 U.S.C. § 612(c)).

This argument is wrong on two levels. First, the Judgment Fund does not pay contracts; it pays money damage awards. 31 U.S.C. § 1304; 41 U.S.C. § 612. So the government’s starting proposition is wrong. A money damage award for breach of contract due to a failure to pay a promised

contract amount may certainly be measured in part by the amount of the underpayment, but in the end it is assessed by the amount of foreseeable damage the contract breach caused the contractor. Thus, an award of damages paid from the Judgment Fund is not a backdoor contract payment, but just a damage award, nothing more. *Wetsel-Oviatt v. United States*, 38 Fed. Cl. 563 (1997); *Bath Iron Works v. United States*, 20 F.3d 1567 (Fed. Cir. 1994); *New York Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) (“The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims”).

Second, the government’s repayment argument is disingenuous. For one thing, the BIA has *never* repaid any of the judgments awarded against it in the long history of this litigation.⁹

Further, agency repayment of a contract damage award under 41 U.S.C. § 612(c) is a matter of interagency accountability, not legal requirement, for it is not enforceable.¹⁰

⁹ See GAO-08-295, *The Judgment Fund: Status of Reimbursements* 9 (2008), reporting that “Officials at three agencies—GSA, Interior and Army Corps—also told us that their agencies had not reimbursed the Judgment Fund because the agencies did not have sufficient funds available.”

¹⁰ “[W]e have acknowledged that [the CDA] provides no sanctions that will compel agencies to reimburse the treasury, and no treasury authority to

Finally, reimbursement of the Judgment Fund is only triggered when “available funds” are sufficient or when “additional appropriations” are obtained “for such purposes,” 41 U.S.C. § 612(c), and appropriated funds needed to carry out on-going programs or to meet other contract obligations are not “available” within that section’s meaning:

[A]gencies are allowed to exercise reasonable discretion in determining the timing of CDA reimbursements so as not to cause the disruption of ongoing programs and activities. . . . [The CDA] [] provides no sanctions that would compel agencies to reimburse the Treasury, and no Treasury authority to take money owed directly from the agency.

GAO-04-481, Judgment Fund 10-11 (2004). *See also* Comp. Gen. Op. B-217990.25-O.M. (Oct. 30, 1987) (“[W]e do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have directed the agencies to pay the judgments and awards directly”). The canard that a judgment awarded Tribes against the BIA could be repaid by the BIA out of appropriated funds serving the Tribes was firmly rejected by the district court years ago:

[T]his issue [of repayment out of BIA appropriations] is not justiciable until [defendants] actually make the award illusory by funding it out of the tribes’ regular appropriations. Such a shell game

take money owed directly from the Agency.” GAO-04-481, Judgment Fund 10 (2004)

would clearly be inequitable and the Court will retain jurisdiction to ensure that the Government does not engage in such charlatanism.

RNC v. Babbitt, 50 F. Supp. 2d 1091, 1095 (D.N.M. 1999) (emphasis in original; brackets inserted).

D. The Government Misreads Case Law.

The government fails to persuasively distinguish cases supporting the tribal contractors, relies on non-contract cases which are not relevant, and depends most heavily on the poorly reasoned and outdated *Oglala* decision.

1. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Contrary to the government's suggestion, the Supreme Court has not predetermined the CSC earmarks issue in the government's favor. The Supreme Court recognized that special statutory authority can bind the government without regard to the availability of appropriations,¹¹ noted the availability of the Judgment Fund, invited the contractors' argument here by referencing the contract-authority *New York Airways* decision—a case virtually on all fours with this one (*see below*)—and studiously avoided the earmarked appropriations

¹¹ The government does not mention the Anti-Deficiency Act's "unless authorized by law" proviso, 31 U.S.C. § 1341(a)(1)(B). When Congress fails to meet its contractual obligation by appropriating sufficient funds to the agency, ISDA contractors may sue for damages and collect from the Judgment Fund under the authority recognized in this proviso, an authority at least as clear as the mail subsidy in *NY Airways*, below. The proviso the government likes—in § 450j-1(b)—receives its prominent attention, while one that it does not like—in § 1341(a)(1)(B)—is ignored.

issue. 543 U.S. at 643. Sections 450j-1(a)(2) and 450j-1(g) confer such special authority.

The § 450j-1(b) proviso is not a normal availability clause for three reasons: (1) the proviso was part of the same public law that added an unconditional directive to add the full amount of CSC to the contract, § 450j-1(a)(2); (2) six years after the proviso was enacted, Congress added the unqualified imperative of § 450j-1(g), reinforcing the entitlement to full CSC; and (3) the proviso does not contain explicit language used by Congress to restrict the contract obligation to available appropriations. *See* the 51 statutes, Appx. 863.

2. *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966) (Gov't Brf. 35-36). The government distinguishes *NY Airways* by stating that there was no availability clause in that contract. This is of course true because *NY Airways* involved an implied-in-fact contract. The bargain consisted of the United States' promise to pay a statutorily-created, rate-based subsidy to the carriers for carrying the mails. The statute creating the subsidy included an "availability" clause similar to the one in ISDA. That clause, equivalent to the § 450j-1(b) proviso and Model Contract section (1)(b)(4), specified that payments were to be made "out of appropriations made to the Board for that purpose." The court interpreted that language as

a payment clause, not a contract-price reduction clause, just as this Court should read the ISDA availability-of-appropriations clauses. *NY Airways*, 369 F.2d at 745-746

3. *St. Regis Mohawk Tribe*, HHS Departmental App. Bd., No. A-02-12, Dec. No. 1808 (2002) (Gov't Brf. 37-38). The 1988 ISDA amendments authorized the Secretary to award calendar-year contracts. The DAB held the provision grants contract authority for the full amount set by § 450j-1(a), even though the last quarter of the calendar year fell within a subsequent appropriation year. This is completely analogous to the authority granted with respect to CSC by § 450j-1(a)(2).

The government utterly fails to address the DAB's decision, discussing only the Administrative Law Judge's earlier recommend decision—specifically the ALJ's remark “in passing”, Gov't Brf. 38, that the availability clause restricts funding, a view the DAB *rejected*. The DAB held that the “otherwise authorized by law” clause of the Anti-Deficiency Act was triggered by ISDA's authorization for calendar-year contracts.

4. *Appeals of Mississippi Band of Choctaw Indians*, IBCA No. 4711, 2006 WL 1009210 (April 14, 2006) (Gov't Brf. 38 n. 12). Even though the Board in this case was constrained by the Federal Circuit's *Oglala* decision, it recognized the Secretary's duty to correct an error made by a contracting

officer litigated long after exhaustion of the appropriation. Under the CDA, when appropriations are unavailable, damages for failure to liquidate the contract obligation are made from the Judgment Fund, just as the *Cherokee* Court recognized. 543 U.S. at 642-643. The nature of the error, whether of inadvertence or law, does not determine access to the Judgment Fund; only a breach of contract is required.

5. *Non-contract appropriations law cases.* The government cites *Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995); and *Greenlee County v. United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 1082 (2008). The government's citations are simply not relevant to the construction of federal contracts because they are not contract cases, a distinction expressly recognized in *Star-Glo*, 414 F.3d at 1355, and *Greenlee County*, 487 F.3d at 879.

Federal contract law is based on the enforcement of promises; none of these cases involved the “unless otherwise authorized by law” exception to the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), since none involved contracts awarded under a statute conferring “special contract authority,” a distinction recognized in *Cherokee*. 543 U.S. at 543. *See Plfs. Brf.* 37-42.

6. *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (Fed. Cir. 1999) (Gov't Brf. *passim*). *Oglala* has simply been overtaken by *Cherokee*. Not only did *Cherokee* itself endorse a leading contract authority case (*NY Airways*), but other post-*Cherokee* CSC cases have cited the Supreme Court decision in rulings at odds with the pre-*Cherokee* state of the law. See, e.g., *Shoshone-Bannock Tribes v. Leavitt*, 408 F.Supp.2d 1073, 1077-78 (D. Or. 2005) (granting post-*Cherokee* motion to reopen case dismissed after pre-*Cherokee* Ninth Circuit decision that relied heavily on *Oglala*. 279 F.3d 660, 663-667 (9th Cir. 2001, as amended 2002)).

7. *RNSB v. Babbitt*, 87 F.3d 1336 (D.C. Cir. 1996). This case did not involve CDA contract damage claims at all. It concerned the limited question of whether an allocation scheme chosen by the Secretary of the Interior for distributing an admittedly insufficient CSC appropriation was arbitrary or capricious. It did not present an issue of contract construction or breach. The plaintiffs did not seek relief in excess of the appropriated sums, but only an order directing that the appropriated sums be rationally allocated. Still, the D.C. Circuit explicitly rejected the argument that the § 450j-1(b) proviso “wipes out’ the rest of the statute.” 87 F.3d at 1346 n. 10. Contrary to the government’s misleading partial quote from this case (Gov’t Brf. 18), the opinion notes (omitted words underscored):

The real purpose of the proviso [§ 450j-1(b)] is quite different when read in context of the entire Act. Given the mandatory terms of the tribes' CSF entitlement under the Act, Congress clearly included the proviso not to excuse the Secretary's obligation to follow the mandate of the statute, but rather 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 (underscoring and italics added).

The Secretary's "obligation" under the mandate of the statute was to insert the full amount of CSC required by § 450j-1(a)(2) and § 450j-1(g) into the contract every year regardless of the size of the CSC appropriation. The D.C. Circuit accepted the distinction made by contractors here between the Secretary's payment duties and the United States' contract obligations. Read in context, this passage supports the contractors' reading, not the government's. *See* Aplt. Brf. 53.

III. THE GOVERNMENT'S POSITION IN *SOUTHERN UTE* IS IRRECONCILABLE WITH ITS ARGUMENTS HERE.

The significance of the *Southern Ute* case arises not only from the admissions made by the government in that case, but from the concrete action the Indian Health Service took before that suit. The IHS—BIA's coordinate agency under ISDA—was so concerned about its exposure to suit that it sought to require that new contractors waive their statutory rights to

CSC even though the CSC appropriation was capped and presumably (so the government now argues) already fully protective of the public fisc. *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp.2d 1245, 1249-1250 (D.N.M. 2007), *appeal dismissed & case remanded*, --- F.3d --- (10th Cir. 2009). Notwithstanding its capped CSC appropriation, IHS was sufficiently concerned about its liability that it sought supplemental protection through an *ultra vires* exculpatory clause. *Southern Ute*, above; *RNSB v. Leavitt*, USDC-NM No. CIV 07-209, Mem. Op. & Order (Feb. 6, 2008).

In the district court briefing giving rise to the *Southern Ute* opinion, *see* Aplt. Brf. 56-60, the government argued that:

. . . A preliminary injunction would compel IHS to enter into a self-determination contract and *thereby incur contractual obligations it has no means to fulfill*. IHS could then keep its promise to plaintiff only by breaking its promises to other Tribes.

Appx. 1693, 1696 (emphasis added). *See also* Aplt. Brf. 57-58. This argument was reiterated in many ways.¹² Appx. 1660, 1666, 1667, 1670-78, 1681-82, 1686, 1689-1694, 1696, 1699, 1702; *especially* Appx. 1694: “Thus, entering the contract would have obligated IHS to pay contract

¹² Contrary to the government’s argument, pressing a supposed distinction between a pre-contract dispute rather than a post-contract dispute (Def. Br. 53), the government itself recognized in *Southern Ute*, that the contract obligation question here at issue was also presented there. Appx. 1675.

support costs for which there were no appropriated funds available.” The plain import of these arguments and the concern they expressed was that executing the statutory ISDA contract in a year when “not to exceed” CSC appropriations were insufficient would nonetheless impose liability on the government for the full CSC amount required by the ISDA and the *Ferris* Rule.

These government arguments and actions reflect, at a minimum, that the proper meaning of the ISDA provisions at issue here are seriously debatable, and that there is a reasonable argument that the statute may be read as the tribal contractors here read it. Thus, technical admission or not,¹³ those arguments and actions confirm that, at a minimum, ISDA’s provisions are ambiguous, in which case ISDA’s mandatory rule of construction must be applied to resolve the ambiguity. 112 F.3d at 1461; 25 U.S.C. § 450l(c), Model Contract sec. 1(a)(2).

¹³ *Guidry v. Sheetmetal Workers Int’l Ass’n*, 10 F.3d 700, 719 (10th Cir. 1993) (acknowledging different kinds of party admissions including statements made by opposing parties in briefs in other cases where the same issue was litigated); *Plastic Container Corp. v. Continental Plastics*, 607 F.2d 885, 904 (10th Cir. 1979) (treating legal conclusion in response to request for admission as binding); *United States v. Brown*, 503 F. Supp. 2d 226 (D.D.C. 2007) (DOJ statements in separate case admissible under FRE 801 as party admission by United States).

IV. THE GOVERNMENT CANNOT DEFEND ON GROUNDS OF INSUFFICIENT APPROPRIATIONS WHEN IT DID NOT SEEK SUFFICIENT APPROPRIATIONS TO PAY THE CONTRACT IN FULL.

Under *S.A. Healy v. United States*, 576 F.2d 299, 300-305 (Ct. Cl. 1978), the United States may defend a breach of contract claim on the basis of an availability clause in only two circumstances: (1) when the agency requested sufficient appropriations but Congress did not accede to the request; or (2) when the agency did not ask for sufficient appropriations *and* the contract expressly and clearly shifted to the contractor the risk that the agency would not seek sufficient appropriations to meet its contract obligations.

In every relevant year Interior failed to request sufficient funds to meet the CSC need. Appx. 231, 239, 1380, 1384, 1388, 1392, 1396, 1400. *See also* Appx. citations at Aplt. Brf. 36. The Model Contract contains no language shifting the risk of an insufficient request back to the contractor.

The government suggests that Interior's reports to Congress pursuant to 25 U.S.C. § 450j-1(c) are sufficient requests for appropriations to allow the insufficiency defense. Gov't Brf. 47-48. But those reports were never timely submitted to Congress, and even if they had been they are not requests for appropriations. Aplt. Brf. 26 n. 21. Federal laws require

submission of thousands of reports to Congress each year. *See, e.g.*, H. Doc. 104-115 (1995); H. Doc. 104-199 (1996); H. Doc. 106-37 (1999). Congress cannot be expected to ferret figures from one report out of the stacks it receives. Requesting full CSC appropriations means placing a request for those funds in the President's annual budget submitted to Congress. And the uncontroverted proof is that this *never* occurred.

As for the § 450j-1(c) shortfall reports, the Secretary has not carried his burden of establishing that those reports were ever submitted to Congress, let alone submitted in a timely fashion; that they were accurate; or that they were even compiled in all years. What we do know from the record is that the shortfall reports for 1994 and 1995 were combined, as were the reports for 1996 and 1997, making plain Congress was not timely advised of CSC needs at least for 1994 and 1996. *See* Appx. 240-256. The government cites the 1998 report, Gov't Brf. 6, but as with the other reports, no evidence in the record supports a finding that this report was submitted to Congress, and the government does not assert that it was.¹⁴ (Frequently

¹⁴ The government's backhanded suggestion that the reports were submitted to Congress (Gov't Brf. 48 n. 16, last sentence) is misleading. That Interior may have provided some draft or final reports to the Tribes does not establish that Interior ever provided them to Congress. Moreover, the source cited, Appx. 1552, actually states that it was Interior's budget justifications—not the § 450j-1(c) reports—that informed Congress of the

reports are prepared by an agency but never cleared through the upper departmental levels for submission to Congress.) Moreover, the 1998 report had not even been prepared 14 months after the close of the 1998 fiscal year. Appx. 242. No 1999 report was ever prepared, and to our knowledge no shortfall reports have been submitted to Congress since.

The government also seeks to avoid responsibility for the reports by arguing that contractors had general advance notice of some level of shortfalls, and therefore knowingly accepted contracts subject to the Model Contract's availability clause. This assumes the contractors understood the clause the same way the government does, which of course they did not. As the government admits, Gov't Brf. 52, the meaning of the clause is not yet decided. Beyond that, the record does not support the government's assertion. Not even the BIA knew whether an appropriation would be sufficient or not. A typical annual Federal Register notice published three months after enactment of an annual appropriations act for the BIA read:

CSC shortfalls and it was those budget justifications that Interior provided to the Tribes. But "budget justifications" are a part of the President's Annual Budget to Congress, and in 1994 through 1997 (as shown in the record), the budget justifications (contrary to the statement at Appx. 1552), did *not* report CSC shortfalls at all, but only the President's requested appropriations. Appx. 210-227. As noted above, in all years, the requested appropriations were well below what was necessary to meet CSC needs. Aplt. Brf. 36.

[Contract Support Funds] will be provided to each [area] office from the remaining available \$90,829,000 based on these (area office) reports. *If these reports indicate that \$90,829,000 will not be sufficient to cover the entire need*, this amount will be distributed pro rata, so that all contractors and compactors receive the same percentage of their reported need.

Appx. 292 (emphasis added).

The sufficiency or insufficiency was not determined until near the end of the fiscal year, at which time a final distribution percentage was calculated and made public. Under these circumstances, contractors had no notice that shortfalls would occur in a particular year, much less the magnitude of any shortfalls, and so cannot be charged with such knowledge.¹⁵

The government posits that Congress would not enact a statute requiring an agency to breach a contract term at the outset and then requiring the contractor to sue annually to recover damages. Gov't Brf. 29. But ISDA does not require the government to breach a contract, and if a follow-on

¹⁵ In any event, signing contracts for less than statutory mandates, Gov't Brf. 6, does not excuse the government from liability. The United States cannot enforce a contract provision less favorable to a contractor than statutorily required, even if the contractor voluntarily waives the statutory right. *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995); *MAPCO Alaska Petrol., Inc. v. United States*, 27 Fed. Cl. 405, 430-31 (Fed. Cl. 1992), *overruled on other grds. Tesoro v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *Appeal of Seldovia Village Tribe*, Interior Board

appropriation is insufficient to pay a contract in full, there is no injustice in permitting the contractor recourse to recover his damages.

Thus it is quite logical to permit the contractor to sue when and *if* appropriations are not sufficient. The insufficiency of appropriations may have ended up being perennial, but it was not predictable and was hardly a foregone conclusion. Nor was it possible for any individual contractor ever to know whether an appropriation for CSC would be sufficient to pay it, nor how much the agency would choose to pay it. *Dougherty*, 18 Ct. Cl. at 503. The contract obligation to pay full CSC continues, as Congress and the BIA recognized when the earmarks were introduced in 1994 and 1995. Aplt. Brf. 11-13. Moreover, ISDA contractors like all other federal contractors are entitled to rely on the usual expectation that Congress will appropriate sufficient sums to meet its contract obligations. *Train v. City of New York*, 420 U.S. at 39 n. 2.

In ISDA Congress offered Tribes the option of running their own programs under contract without loss of program services. The United States has breached that bargain. The tribal contractors are entitled to recover damages for that breach.

of Contract Appeals, Nos. IBCA 3862 & 3863 (Oct. 20, 2003) (applying rule in ISDA case).

CONCLUSION

FOR THESE REASONS, Plaintiffs-Appellants ask that this Court reverse the decision appealed from and remand for further proceedings consistent with its reversal.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,366 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2002 in a proportionally spaced Times New Roman typeface in a 14-point font.

/s/ Daniel H. MacMeekin
Daniel H. MacMeekin
Dated: July 13, 2009

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellants' Opening Brief, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with Avira AntiVir antivirus software, version 8.2.0.353, virus definition file 7.01.04.220, last checked for updates July 12, 2009, and according to the program, is free of viruses.

/s/ Daniel H. MacMeekin
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Dated: July 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Appellants' Opening Brief to be served by Federal Express standard overnight service this 13th day of July, 2009, on:

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In addition, on the same day, the digital submission was filed electronically through the Court's CM/ECF system, which caused the foregoing counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, at the following e-mail address:

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