

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

**RAMAH NAVAJO CHAPTER,  
OGLALA SIOUX TRIBE, and  
PUEBLO OF ZUNI**, for themselves  
and on behalf of a class of persons  
similarly situated,

Plaintiffs,

vs.

No. CIV 90-0957 LH/KBM ACE

**GALE NORTON**, Secretary of the  
United States Department of Interior, et al.,

Defendants.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION

After three years awaiting the outcome of *Cherokee v. Thompson*, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002), *rev'd sub nom Cherokee v. Leavitt*, 125 S. Ct. 1172 (March 1, 2005) (“*Cherokee*”), Plaintiffs Ramah Navajo Chapter, Oglala Sioux Tribe, and Pueblo of Zuni file this supplemental brief, seventh in the series including Docket Numbers 397, 571, 583, 594, 604, and 605 to discuss the impact of *Cherokee*.

Before 1994 Congress enacted general purpose lump sum appropriations for operation of Indian programs. Since then Congress has carved out a “not to exceed” portion of the general appropriation for contract support costs (CSC) mandated by The Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (ISDA). The pending motion seeks to establish the liability of the United States for the “not to exceed” years.

The Supreme Court has confirmed the enforceability of ISDA contracts according to ordinary precepts of contract law. It is for this Court to apply these precepts to the last unsettled matter in this long case – what is the contract price of an (ISDA) contract?

## OVERVIEW OF REMAINING ISSUES

By an 8-0 ruling, Chief Justice Rehnquist not taking part, *Cherokee* affirmed the sanctity of ISDA contracts. ISDA contracts are contracts no less enforceable than other federal contracts. Self-Determination contracts are *no different from government procurement contracts with respect to the binding nature of a promise*:

The Act, for example, uses the word “contract” 426 times to describe the nature of the Government’s promise; and the word “contract” normally refers to “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”

125 S. Ct. at 1177-1178. Thus, rules of construction that apply to ordinary procurement contracts apply to ISDA contracts as well.<sup>1</sup>

Ordinary rules of contract interpretation include the duty to give effect to every provision; to harmonize all provisions to the extent possible; to construe ambiguity against the drafter (the United States); and above all to carry out the manifest intent of the contract and its statutory authority.

1. Not addressed in *Cherokee* is the question whether there is any difference, as regards the United States' contract obligation for contract support costs, between a ten figure general appropriation involved in *Cherokee* and the "not to exceed" nine figure CSC lump sum appropriation at issue here, where either amount is sufficient to pay any individual contractor but proves insufficient to pay all contractors.

Plaintiffs contend the United States bears the risk of insufficient appropriations under either scenario. Defendants formerly contended the tribal self-determination contractor bore the burden under either scenario, but the Supreme Court in *Cherokee* held that under the first scenario the United States should be held liable for shortfalls in contract payments. The authorities on which the Supreme Court relied to reach that result apply equally to the second scenario. In the shorthand of the case, this is the "availability issue".

2. *Cherokee* does not explicitly state, again because it did not reach the issue, whether the phrase "subject to availability of appropriations" in the funds available clause of the mandatory Self-Determination contract speaks to the *Secretary's expenditure authority*, or

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<sup>1</sup> This very outcome was predicted by the Department of Justice in 1988. Attached as Exhibit 1 to this Memorandum is a 1988 letter from John R. Bolton, then an Assistant Attorney General, to the Senate Committee on Indian Affairs Chairman, Senator Inouye, critiquing S. 1703, which became the ISDA. On pp. 7-8, Mr. Bolton points out that the only body of law which courts could use to interpret the amended ISDA would be federal procurement law.

whether it speaks to *the liability of the United States*. In the shorthand of the case again, this is the contract authority issue.

Plaintiffs contend the exculpatory clause speaks only to the Secretary's expenditure authority: if Congress does not provide sufficient funds the Secretary cannot write checks to cover all ISDA contract support obligations, but that does not make the obligations go away. Defendants contend it speaks to the liability of the United States for the contract price: if Congress does not provide sufficient funds for CSC, that means no obligation for the full contract price was ever created. The many factors suggesting Plaintiffs' argument is correct are enhanced by the decision in *Cherokee*.

3. The third issue not reached in *Cherokee* is whether the agency requested adequate appropriations. If the agency failed to request an adequate appropriation, and the contract does not clearly and unambiguously impose the risk of an inadequate request on the contractor, the United States remains liable for the full contract amount regardless of the resolution of the broad "contract authority" issue or the narrow "availability" issue. *S.A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978). Once more, *Cherokee* tends to support Plaintiffs' contention.

If Plaintiffs prevail on any one of the three issues, they are entitled to contract damages for the government's failure to pay the full amount of their contract support costs.

## ARGUMENT

### I. “NOT TO EXCEED” LANGUAGE, NEITHER IN AND OF ITSELF NOR IN COMBINATION WITH SECTION 314, TRANSFORMS “FERRIS”-TYPE APPROPRIATIONS TO “SUTTON”-TYPE APPROPRIATIONS.

As the Supreme Court held in *Cherokee*, citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883), and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 and n. 9 (Ct. Cl. 1980):

[A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, 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 the agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. . . .** “A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.” (emphasis added)

125 S. Ct. at 1177-1178, quoting *Ferris*. *And see Ross Construction Co. v. United States*, 392 F.2d 984, 986-987 (Ct. Cl. 1968).

Thus each of the three contractors here had a right to be paid from the legally available lump-sum contract support cost appropriation, and the Secretary’s failure to do so renders the United States liable in damages.

There is no relevant distinction between the ten-figure lump sum appropriation involved in *Cherokee* and the nine-figure contract support costs lump sum appropriation involved in the capped years for purposes of the rule that *a lone contractor is not charged with knowledge that the agency has spent its appropriation elsewhere*. The obligation of the contract endures and may be recovered through a judgment for money damages.

Decisively, this is **not** a case of a single appropriation for a specific contract or project and a single contractor where the contractor may be charged with knowledge as in *Sutton v. United States*, 256 U.S. 575 (1921). Here the appropriation is for hundreds of contractors and involves a nationwide category of costs in the hundreds of millions of dollars, a sum greater by orders of magnitude than the amount any individual contractor is owed. This is a lump-sum appropriation for CSC.

Under these circumstances can an individual contractor be reasonably charged with knowledge that the “not to exceed” amount will not be sufficient to cover its contract price and that it will have to suffer a reduction? Is it charged with the duty to track the progress of each year’s appropriation by monitoring the agency’s request for an appropriation through the OMB, on to the Congress, through the committees, into law and then through the agency’s internal allocation process? Must it ferret out the number of ISDA contractors, the scale of programs they have contracted to carry out that year, their ever-adjusting indirect cost rates, their total CSC need and the agency’s decision on an allocation methodology, all of which information must be known to determine how much of a shortfall (if any) there will be and the financial impact this will have on a particular contractor? These questions suggest their own answers.

Even the agency does not know how far the appropriation for contract support will go. Each year following the passage of the Appropriations Act, the BIA has published a formal Federal Register notice announcing distribution protocols for the contract support cost appropriation. For example, the 1999 Federal Register announcement, Vol. 114, No. 10, January

15, 1999, at 2658-2659 (included at Exhibit B to the Affidavit of Earla Begay dated February 17, 2000, Docket No. 397, Attachment C) ("Begay Affidavit")<sup>2</sup> states:

SUPPLEMENTARY INFORMATION: A total of \$114,871,000 is available in the Operation of Indian Programs (OIP) amount for contract support requirements (excluding construction requirements) during FY 1999. . .

ONGOING/EXISTING CONTRACTS/ANNUAL FUNDING AGREEMENTS. . . . Each area office will submit a CSF Needs Report to the Central Office for ongoing contracts annual funding agreements by July 15, 1999. CSC will be provided to each area office based on these reports. *If* these reports indicate that \$114,871,000 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 this reported need . . .

The amount of 70 percent is authorized at this time to ensure that all tribes receive the same level of funding *should* the appropriations be insufficient to pay full indirect costs. (emphasis added)

Nothing in this language alerts an individual contractor to the fact that a shortfall will necessarily occur, or the dollar impact any such shortfall will have on their particular contract for that year. In fact, the announcement states that final figures will not be known until the end of July, well into the fourth quarter when most of the services have already been performed. See Exhibit 2 to this Memorandum, sample Federal Register Notices 1995 through 2003; Exhibit B to Begay Affidavit, FY 1997 "Notice of Percentage of Need" (issued September 24, 1997, **six days** before the end of fiscal year) and FY 1998 contract modifications (notice issued September 22, 1998, **eight days** before end of fiscal year).

Thus, Plaintiffs receive no notice of shortfalls before they have delivered the bulk of their services. See, e.g., *N.Y. Central RR. Co. v. United States*, 21 Ct. Cl. 468, 470-472 (1886). Even

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<sup>2</sup> Attachment references are to documents marked "Attachments" to the original motion, Docket No. 397 (A-H) and the amended motion, Docket No. 571 (I-S).

if there were statements in committee reports indicating that the monies might not be enough, statements in reports are not law, *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), nor is an individual contractor required to read committee reports, nor is he charged with knowledge of their contents.

What *Cherokee* said about the general agency lump-sum appropriation applies equally to the contract support cost appropriation:

Finally, we have found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.

125 S. Ct. at 1179.

The appropriations here are completely different from single-purpose or single-project and single contractor appropriations such as that in *Sutton*, a precise appropriation of \$20,000 for a contract to improve the channel from Clearwater Harbor through Boca Ciega Bay to Tampa Bay, Florida, let to a single contractor. See also, GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2d Ed., Vol. II, 6-18.<sup>3</sup>

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<sup>3</sup> Congress clearly knows how to impose a statutory "earmark" on amounts available for a contract as it did for the project in *Sutton*. In fact, Congress often did so during the years at issue here. e.g., Pub. L. 105-18, 111 Stat. 158, 199 (1997) ("[T]he Secretary . . . shall enter into a contract with the National Academy of Public Administration not to exceed \$1,000,000 . . . for an evaluation of the [HUD's] management systems"); Pub. L. 103-327, Tit. III, 108 Stat. 2298, \_\_\_ (1994) (not to exceed \$75,000 per project"); Pub. L. 103-317, Tit. II, 108 Stat. 1724, \_\_\_ (1994) ("of which \$2,500,000 is for a grant to the City of Kansas City, Missouri for the development of a weather and environmental center"); Pub. L. 103-316, Tit. I, 108 Stat. 1707, \_\_\_ (1994) (listing 55 individual "projects" in "amounts specified" ranging from \$40,000 to \$20,000,000 each, in the Department of Defense Army Corps of Engineers appropriation).

Here, a general appropriation for a nationwide category of contract costs was made. Hundreds of contracts are involved. The contractors were expected to perform at least late into the fourth quarter of the fiscal year before receiving notice of any possible shortfall. The rule in *Ferris, Dougherty, and Blackhawk* applies. The mere fact the agency has spent all the money from the appropriation does not affect the liability of the United States, though the Secretary is constricted in her ability to make payments to contractors.<sup>4</sup>

In short, *vis-à-vis* a nine figure appropriation labeled contract support or a ten figure general appropriation labeled “operation of Indian programs,” the individual contractor stands in

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<sup>4</sup> Full payment of Plaintiffs’ contracts would have met the time–purpose–amount rule of appropriations law: (1) each payment would have carried out the Appropriations Acts’ purpose; (2) each payment would have been for an obligation arising in the same year covered by each appropriation; and (3) each payment, alone or together, would have been well within the \$91 to \$136 million Congress made available each year for the CSC contract payments. U.S. General Accounting Office, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* at 4-2 (3d. Ed. 2004) (“APPROPRIATIONS LAW”) (articulating the familiar “purpose, time, and amount” test); *see, Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1084 (Fed. Cir. 2003), *aff’d, Cherokee Nation, et al. v. Leavitt, et al.*, 125 S. Ct. 1172 (2005) (noting the opinions of the GAO and the Comptroller General are “expert opinions”); *see also* INSTRUCTIONS ON BUDGET EXECUTION, OMB Circular A-34, sec. 11.5 at 8-10 (2000) (the ‘purpose-time-amount’ test answers the question: “**How can I tell whether appropriations are legally available?**”), *superceded by* OMB Circular A-11, Part 4 (2002).

The condition reflected in the ISDA and applied by the Supreme Court in *Cherokee* – that sufficient appropriations be legally available to pay the contractor – was satisfied each fiscal year. It may well be true that “the agency’s total lump-sum appropriation [was] insufficient to pay all the contracts the agency ha[d] made,” but that is precisely the circumstance the Supreme Court in *Cherokee* said could not stand in the way of the contractor’s right to be paid. 125 S. Ct. at 1177-1178. *See* 19 Nash & Cibinic, Rep. 29 (attached as Exhibit 3) (“The Supreme Court appears to have adopted the position that the ‘availability of appropriations’ clause does not shield the Government from liability even if the Government has over-obligated its lump sum appropriation.”) John Cibinic, Jr. and Ralph C. Nash, Jr., are authors of the oft-cited “major treatise on government contracts.” *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1373 (Fed. Cir. 2003); *see also United States v. Winstar*, 518 U.S. 839, 890 n. 36 (1996) (citing Nash and Cibinic’s 1977 Federal Procurement Law treatise); *Short Bros., PLC v. United States*, 2005 WL 1395028, 92 (Fed. Cl. June 10, 2005) (“Government contracts experts”).

