

**CASE NO. 07-2274**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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SOUTHERN UTE INDIAN TRIBE, )  
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 )  
 Plaintiff-Appellant )  
 )  
 v. )  
 )  
 MICHAEL O. LEAVITT, Secretary )  
 of the United States Department of )  
 Health and Human Services, et al., )  
 )  
 Defendants-Appellees )

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On Appeal from the United States District Court  
for the District of New Mexico  
The Honorable Judge William P. Johnson  
D.C. No. 1:05-cv-00988-WJ-LAM

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

The response Brief for the Appellees (“Response”) illustrates the failure of the Indian Health Service (“IHS”) to understand and abide by the clear terms of the Indian Self-Determination and Education Assistance Act (“ISDA” or “Act”).<sup>1</sup> IHS has repeatedly put forward interpretations of the ISDA that are contrary to the Act’s plain language, exceed the limited authority delegated to IHS by Congress, and impermissibly confuse the contract formation and contract performance aspects of the ISDA. IHS’s failure to comply with the plain language of the ISDA has significantly delayed and obstructed the Southern Ute Indian Tribe (“Tribe”) in its effort to assume management and operation of the Southern Ute Health Clinic (“Clinic”), as envisioned by Congress in the ISDA. IHS’s Response continues this approach by urging this Court to agree that, because Congress has allegedly not appropriated sufficient funds for IHS to pay all of its contractual obligations, IHS is therefore permitted to unilaterally require additional self-determination contract language limiting the Tribe’s right to contract support costs (“CSC”).

IHS’s position is not supportable because the Agency’s interpretation of the ISDA is flatly incorrect, its fear of being forced into a contract it must immediately breach is groundless, and, even if correct on those points, it fails to provide any reasonable response to appropriations law arguments made by the Tribe and the National Congress of American Indians (“NCAI”), in its brief *Amicus Curiae*. Thus, this Court must reject

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<sup>1</sup> Appellees are collectively referred to as “IHS” or “Agency” in this Reply.

the IHS's attempt to avoid its statutory duties under the ISDA and reverse the District Court's Order of October 18, 2007 ("Second Order").<sup>2</sup>

## ARGUMENT

### I. IHS'S INTERPRETATION OF THE ISDA IS PLAINLY WRONG.

The parties have been unable to agree on the form of a contract under the ISDA due to the insistence of the IHS that the Tribe's contract must include a term stating that it is entitled to \$0 in CSC funds. The Tribe has rejected this proposed term because its inclusion is prohibited under the contract formation provisions of the ISDA.

This case is solely about contract formation. Questions of contract performance, where no contract exists, are unripe and irrelevant. The central issue, therefore, is the ISDA's mandate that, in the formation of a self-determination contract, the contract must include not only the "Secretarial amount", but must also state a CSC amount sufficient to cover the reasonable costs of the contract. 25 U.S.C. § 450j-1(a)(2). The Tribe seeks a self-determination contract for the Clinic stating a specific CSC amount that would actually cover the reasonable costs of the contract, as the ISDA requires.

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<sup>2</sup> This Reply does not address issues pertaining to jurisdiction or the contract start date, with one exception. These issues have been fully briefed by both parties, and indeed, IHS's Response provides nothing new regarding these issues to which the Tribe need reply. The Tribe does note, however, that to the extent the Response argues that a contract start date of October 1, 2005 would enable the Tribe to collect a "windfall" in funds for operation of the Clinic when it never actually performed those operations, the Tribe has already acknowledged that it would lose such a claim under the Contract Disputes Act and that to bring such a claim would be moronic. Doc. No. 68, Tr. of Pl.'s Mot. to Set Presentment Hr'g and Defs.' Mot. for Clarification at 50-51, Aplt. App. at 449-50. The principal underpinnings of IHS's arguments concerning a "windfall" are therefore without merit.

IHS asserts that language in the ISDA limiting the Agency's *performance* of contractual duties by making them "subject to the availability of appropriations" grants it the authority to unilaterally impose contract provisions that limit the amount of CSC in the contract to *less* than the "reasonable amount" directed by the ISDA. 25 U.S.C. § 450j-1(b). In fact, regardless of other provisions in the ISDA explicitly identifying both the "Secretarial amount" and the CSC amount that must be included in ISDA contracts, IHS asserts that it can unilaterally impose a provision stating that the Tribe will receive \$0 in CSC. *See, e.g., Response* at 28-30. IHS fails to recognize the distinction between those ISDA provisions governing contract formation and contract performance. Furthermore, IHS's interpretation of the statute violates accepted rules of statutory construction.

**A. The ISDA Treats Contract Formation Differently Than Contract Performance.**

In the ISDA, Congress created rules that distinguish between contract formation and contract performance. IHS is given no discretion with regard to the provisions that pertain to contract formation—Congress has orchestrated the entire process. *See Appellant's Opening Brief* at 10-11, 13, 16-17. Issues that pertain to contract performance are different, however, because the ISDA includes certain conditions, such as a lack of sufficient Congressional appropriations, which may legally excuse IHS's performance of an *existing* self-determination contract. Because those conditions are relevant only *after* the parties have entered into a contract under the ISDA, they do not play a role in contract formation.

Contract formation under the ISDA requires that IHS enter into a contract upon the request of a tribe, under the terms of the ISDA’s model agreement, and the contract must include a specific, reasonable amount of CSC sufficient to cover the actual costs of the contract. 25 U.S.C. §§ 450f(a)(1) and (2); *see Menominee v. United States*, 539 F. Supp. 2d 152, 155 (D.D.C. 2008) (“ISDA mandates the payment of full indirect CSC and ISDA itself establishes that entitlement.”) (Internal citation omitted). Contracts may include terms that differ from the model agreement, but only if both parties agree to their inclusion. *Id.* at § 450l(a)(2). The amount of funding specified in the contract shall include the total amount specified in the annual funding agreement (“AFA”), but not less than the “Secretarial amount” and CSC in an amount reasonably sufficient to cover the costs of the contract. 25 U.S.C. §§ 450j-1(a)(1) and (2) and 450l(c) (model agreement § 1(b)(4)).

Sections 450j-1(a)(1) and (2) are the mandatory funding provisions that IHS is required to include in self-determination contracts. Those provisions state:

**(a) Amount of funds provided**

**(1)** The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter *shall not be less* than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract . . . is operated.

**(2)** *There shall be added* to the amount required by paragraph (1) contract support costs which *shall* consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management . . . .

*Id.* (Emphasis added). “[U]se of the word ‘shall’ indicates a mandatory intent,” *Keith*

*v. Rizzuto*, 212 F.3d 1190, 1193 n.3 (10th Cir. 2000) (citing *United States v. Myers*, 106 F.3d 936, 941 (10th Cir.1997)). The ISDA therefore eliminates any discretion on the part of IHS, during contract formation, to refuse the addition of CSC in an amount less than the “reasonable costs” incurred by a tribe in carrying out the contract.

Other, separate ISDA provisions regarding contract performance, namely Section 450j-1(b), offer IHS more latitude with regard to payment of funds after entering a contract. That section, which is the contract performance provision at issue in this case, states that, “[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . . .” IHS is not required to pay an ISDA contractor if appropriations are not available.

Thus, the ISDA distinguishes between contract formation, which follows a process carefully orchestrated by the statute and which leaves IHS without sole discretion to either ignore or modify the contract terms dictated by that process, and contract performance, which may be excused if the Agency does not receive sufficient appropriations. IHS simply misses this distinction.

**B. IHS’s Interpretation of the ISDA Violates Established Rules of Statutory Construction.**

IHS’s interpretation of Section 450j-1(b) violates established rules of statutory construction by ignoring its plain meaning and rendering it meaningless as to excusing IHS performance under the contract. In addition, IHS’s interpretation of the ISDA’s model agreement, which interpretation was adopted by the District Court, is also inconsistent with these rules of statutory construction.

**1. Rules of statutory construction begin with the statute's language, require that all provisions be interpreted as meaningful, and require contextual analysis for particular words.**

Statutory construction “‘must begin with the language of the statute itself,’ and ‘[absent] a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’” *NISH v. Rumsfeld*, 348 F.3d 1263, 1268 (10th Cir. 2003) (quoting *Bread Political Action Comm. v. Fed. Election Comm’n, et. al.*, 455 U.S. 577, 580 (1982)) (brackets in original). Where that language refers only to a certain thing, this Court has refused to read any apparently excluded phrase into the statute. *Youren v. Tintic Sch. Dis.*, 343 F.3d 1296, 1308 (10th Cir. 2003) (“[to] express or include one thing implies the exclusion of the other, or of the alternative’. . . . ‘The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.’”) *Id.* (Quoting Black's Law Dictionary (7th ed. 1999) and *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1034 (10th Cir. 2003)).

In addition, a statute cannot be interpreted in a way that would make one of its provisions nugatory or redundant. *Andersen v. Dir., Office of Workers’ Comp. Programs*, 455 F.3d 1102, 1106 (10th Cir. 2006) (statutory interpretation must “not render any part of the statute meaningless, redundant, or superfluous.”)

“[A]s a general rule, statutory language is to be interpreted according to the common meaning of the terms employed.” *NISH*, 348 F.3d at 1268. “The meaning of a word may be ascertained by reference to the meaning of words associated with it.” *Neal*

*v. Clark*, 95 U.S. 704, 708 (1877) (internal quotation omitted). “A word is known by the company it keeps”, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., et. al.*, 515 U.S. 687, 694 (1995), and “[g]enerally, when the same words are used in different sections of the law, they will be given the same meaning.” *Barnson v. United States*, 816 F.2d 549, 554 (10th Cir. 1987) (citing *Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982)).

**2. IHS’s interpretation of section 450j-1(b) violates basic tenets of statutory construction.**

IHS cites authority supporting its assertion that the phrase “subject to the availability of appropriations” is clear and unambiguous. *Response* at 29 (citing *Shoshone-Bannock Tribes v. Thompson, et. al.*, 279 F.3d 660, 667 (9th Cir. 2002); *Babbitt v. Oglala Sioux Tribal Public Safety Dep’t*, 194 F.3d 1374, 1378 (Fed. Cir. 1999); *Ramah Navajo Sch. Bd. v. Babbitt, et. al.*, 87 F.3d 1338, 1345 (D.C. Cir. 1996)). But IHS fails to acknowledge that these decisions never considered whether that phrase clearly and unambiguously allows IHS to unilaterally require the addition of terms to a self-determination contract that are not authorized by the ISDA. Such an interpretation, as offered by IHS, is not consistent with the phrase’s language, reads additional language into the phrase that was not included, and essentially renders the phrase meaningless, all in violation of this Court’s accepted rules of statutory construction.

IHS urges this Court to read the ISDA as conflating IHS’s responsibilities for contract *formation* with its right to be excused from contract *performance* in certain instances; however, the ISDA makes a clear distinction between contract formation and

performance. Section 450j-1(b) highlights the ISDA’s distinction between contract formation and performance, stating that only “*the provision of funds . . .* is subject to the availability of appropriations . . . .” (Emphasis added). That section does *not* also make the IHS’s duties to include a reasonable amount of CSC in a contract subject to the availability of appropriations. Nevertheless, IHS attempts to rely on the “availability of appropriations” language to justify eliminating any reasonable amount of CSC from the Tribe’s contract altogether during contract formation. *Response* at 28–35.

IHS’s position does not “begin with the language of the statute itself”, which, in this instance, can be regarded as conclusive because Section 450j-1(b) addresses only “*the provision of funds*” and does not address the amount of funds to be stated in a contract. *NISH*, 348 F.3d at 1268. Indeed, had Congress intended for IHS to rely on Section 450j-1(b) to avoid stating a reasonable amount of CSC in any contract under the ISDA, that section could have included additional language granting IHS that authority. Elsewhere in the ISDA, Congress showed its ability to be quite clear with regard to the amount of funds that must be expressly included in self-determination contracts, *see* Reply § I.A, *supra*; 25 U.S.C. §§ 450j-1(a)(1) and (2); however, Congress did not include additional language in Section 450j-1(b) allowing IHS to address the availability of appropriations at the contract formation stage. This Court cannot now permit IHS to read this additional and excluded phrase into Section 450j-1(b). *Youren*, 343 F.3d at 1308.

Aside from effectively amending the ISDA by adding a phantom phrase, an additional effect of IHS’s interpretation of Section 450j-1(b) is that the legal excuse in that section, which excuses IHS from paying funds if appropriations are not available, is

rendered meaningless. If IHS is correct and the availability of appropriations can be taken into account when determining the amount of CSC to be stated in an ISDA contract during contract formation, then the CSC amount included in the contract would always be an amount IHS subjectively believes is available to pay, rather than the amount objectively determined to be reasonable to cover the costs of the contract. Thus, under IHS's approach, Congress' decision to make "the provision of funds . . . subject to the availability of appropriations" was an exercise in redundancy and the phrase adds nothing to the ISDA. Such an interpretation cannot be supported. *Andersen*, 455 F.3d at 1106 (statutory interpretation must "not render any part of the statute meaningless, redundant, or superfluous.").

On the basis of its accepted rules of statutory construction, this Court cannot agree with IHS's reading of the ISDA's "availability of appropriations" language.

**3. IHS's interpretation of the ISDA's model agreement also violates the rules of statutory construction.**

IHS contends, and the District Court agreed, that IHS's proposed contract language complies with the ISDA because the Act's model agreement requires that "[t]he [AFA] under this Contract shall . . . contain terms that identify . . . the funds to be provided, and the time and method of payment," 25 U.S.C. § 450l(c) (model agreement § 1(f)(2)(A)(i)). IHS asserts that requiring the amount of CSC in the Tribe's contract to be stated as \$0 identifies "the funds to be provided," *Response* at 20-21, and also suggests that "the provision stating that the Tribe will be placed on IHS's shortfall list for payment in accordance with IHS policy if and when funds become available identifies 'the time

and method of payment,” *Response* at 36 (quoting the ISDA). IHS’s reading of the model agreement takes it out of context, ignores its plain meaning, and renders its words meaningless.

- a. ***The model agreement’s requirement that the AFA identify the “funds to be provided” cannot be interpreted to allow \$0 as the amount of CSC in the contract.***

IHS states in its *Response* that “the amount of CSC designated in the contract [] should be \$0, which is the amount available to be provided to [the Tribe] . . . .” *Response* at 20-21. Thus, the terms proposed by IHS do not identify any “funds” much less identify those funds that are “to be provided” by IHS, and certainly does not identify the “amount for the reasonable costs” of the contract required by the ISDA. IHS attempts to ignore the plain language of the statute, which unambiguously requires that the AFA include terms that identify some “funds to be provided” and specifically requires that it identify the “amount of reasonable costs” objectively necessary to support the contract. Such ignorance of the ISDA cannot be excused by this Court where the statute’s language is conclusive. *NISH*, 348 F.3d at 1268.

In addition, IHS’s interpretation of Section 450l(c)’s “funds to be provided” language would render that language meaningless. If IHS is allowed to simply include nothing (i.e., \$0) as the amount of CSC to be provided under the Tribe’s contract, the model agreement’s requirement to include actual “funds” is useless. This interpretation is not allowable. *Andersen*, 455 F.3d at 1106.

Lastly, IHS’s interpretation of the phrase “funds to be provided” directly contradicts language found elsewhere in the model agreement, which requires that the

amount to be included in the AFA “shall not be less than the applicable ... amount” under 25 U.S.C. § 450j-1(a). 450l(c) (model agreement § 1(b)(4)). As described above, Section 450j-1(a), found in the ISDA’s contract formation provisions, requires the addition of CSC in an amount equal to the “reasonable costs” that would be incurred by the Tribe in carrying out the contract; an amount that would certainly not equal \$0. IHS cannot disregard the context in which the phrase “funds to be provided” is used in the model agreement, particularly where such disregard would render a separate section of the model agreement meaningless. *Andersen*, 455 F.3d at 1106.

**b. *The model agreement’s requirement to identify the “time and method of payment” cannot be interpreted to support IHS’s position.***

In addition to ignoring the statutorily required amount of CSC in favor of a provision stating its obligation as \$0, IHS insists that the Tribe’s contract include contract language stating that the Tribe would be placed on the IHS’s CSC shortfall list. *See, e.g., Response* at 21. IHS argues that, by including a reference to this policy, the contract would identify the “time and method of payment,” in accordance with the model agreement. 25 U.S.C. § 450l(c) (model agreement § 1(f)(2)(A)(i)). Once again, however, the rules of statutory construction show IHS is mistaken.

The phrase “time and method of payment” is defined in the model agreement at Section (1)(b)(6)(B)(i), 25 U.S.C. § 450l, which makes clear that the phrase refers to how the money will be paid:

[T]he Secretary shall make available to the Contractor the funds specified for the fiscal year under the [AFA] incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the [AFA] for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the [AFA].

Accordingly, “time and method of payment” refers to the frequency with which the IHS will distribute funds (*e.g.* quarterly, semiannual, lump sum, or as requested by the Contractor).

“Time and method of payment” is defined in a section of the model agreement that is different than the section at issue here (the definition is in model agreement Section (1)(b)(6)(B)(i) and Section (1)(f)(2)(A)(i) is the section at issue here). Nonetheless, the rules of statutory interpretation instruct that the definition quoted above must be considered as context for the phrase’s meaning and, consequently, that the phrase should have the same meaning in both sections. *Neal*, 95 U.S. at 708; *Sweet Home*, 515 U.S. at 694; and *Barnson*, 816 F.2d at 554.

Contrary to the guidance offered by the model agreement’s definition of the phrase, IHS contends that “time and method of payment” properly allows the Tribe to be placed on a shortfall list and perhaps never be paid the “amount of reasonable costs” objectively necessary to support the contract by any method at any time. Indeed, given the IHS’s description of its shortfall list policy, the application of that policy more accurately describes a time and method of *non-payment*. *See Response* at 11–12 (explaining that, according to the IHS manual, if there are not enough funds to pay all CSC requests, tribes will be placed on a shortfall list and may be paid at some point in the

future if IHS makes a subjective determination that funding has become available). Thus, even if this Court were to ignore the statutory context of the model agreement, which clearly defines “time and method of payment” differently than IHS suggests, IHS’s interpretation would still not be allowable because it does not comport with the “language of the statute itself.” *NISH*, 348 F.3d at 1268.

## **II. IHS’S CONCERN ABOUT ENTERING A CONTRACT IT MUST IMMEDIATELY BREACH IS BASELESS.**

IHS has consistently argued that the Tribe seeks to force IHS into a contract that IHS will immediately breach. *See, e.g., Response* at 30, 33, 36. In doing so, IHS again confuses the differing obligations of contract formation and contract performance and was able to convince the District Court that such confusion was supported by the ISDA. *See Doc. No. 66, Second Order* at 8-9, *Aplt. App.* at 396-97.

In enacting the ISDA, Congress anticipated that appropriations might be insufficient.<sup>3</sup> To address this contingency, Congress incorporated a basic principle of contract law into the Act by providing a legal excuse from performance. *See* 23 Williston on Contracts § 63:1 (4<sup>th</sup> ed.) (“a breach of contract is a failure, *without legal excuse*, to perform any promise that forms the whole or part of a contract.” (Emphasis added)). Subjecting the provision of funds under ISDA contracts to “the availability of appropriations,” creates a legal excuse to avoid payment of funds that are not available.

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<sup>3</sup>Although IHS claims that, at least for FY 2005, appropriations were insufficient to pay the Tribe CSC if the parties enter the contract as proposed by the Tribe, the Tribe would not be able to determine whether that claim is accurate unless and until IHS enters the contract and actually fails to pay CSC on the basis of insufficient appropriations.

IHS is familiar with the concept that a failure by Congress to appropriate sufficient funds is a legal excuse to contract performance. *See Response* at 37 (implicitly adopting the Supreme Court’s characterization of IHS’s argument in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), as IHS being “legally bound by its promises if, and only if, Congress appropriated sufficient funds . . . .”)<sup>4</sup> Indeed, as IHS notes in quoting *Cherokee Nation*, the requirement that IHS pay CSC under an ISDA “contract does not become binding unless and until Congress appropriates funds for that year.” *Response* at 37 (quoting *Cherokee Nation*, 543 U.S. at 643).

Consequently, IHS could only breach the Tribe’s proposed contract if, after actually entering the contract, it failed to pay the contractually required amounts, even though sufficient appropriations existed to do so. Assuming *arguendo*, that IHS is correct in claiming insufficient funds have been appropriated and IHS is unable to pay the Tribe’s CSC based on that lack of funds, IHS would not be entering a contract that it would immediately breach, because Congress foresaw such a possibility and allowed the agency a legal excuse from performance under those circumstances. This Court must therefore reject IHS’s baseless claim that the Tribe’s proposed contract must include

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<sup>4</sup> Notably, IHS suggests that the Tribe misconstrues *Cherokee Nation* when the Tribe argues that the Supreme Court’s holding supports the Tribe’s position that, if funds are available, IHS has no legal excuse to avoid payment of CSC. *Response* at 37-38. IHS’s attempt to distinguish the Tribe’s position from *Cherokee Nation*’s holding falls flat; however, because the three distinguishing factors identified by IHS in this case—there is no existing contract, CSC funding is statutorily capped and the Tribe knew of the lack of adequate funding when submitting its proposal—are simply irrelevant to the Tribe’s position, supported by *Cherokee Nation*, that, under the ISDA, IHS is legally bound to pay CSC if “Congress ha[s] in fact appropriated unrestricted funds . . . adequate to pay the [T]ribe.” *Response* at 38.

language obligating IHS to pay *less* than the “amount for the reasonable costs” of the contract (*i.e.*, \$0) in order to avoid an immediate breach; a claim belied by IHS’s own prior arguments in *Cherokee Nation* but which was, nonetheless, accepted as true by the District Court.

### **III. IHS MISUNDERSTANDS OR COMPLETELY FAILS TO RESPOND TO APPROPRIATIONS LAW ARGUMENTS RAISED BY APPELLANT AND NCAI.**

IHS’s responses to the underlying FY 2008 appropriations law issues advanced by Appellant, and supported by NCAI, make no sense. *See Appellant’s Opening Brief* at 20, n.8; *see also generally Brief Amicus Curiae of the National Congress of American Indians in Support of Appellant and Reversal of the District Court.*

IHS argues that appropriations were not available in FY 2005 and that IHS proved by affidavit that its entire FY 2005 CSC appropriation was spent. *Response* at 45. Putting aside that IHS is in error about that older appropriation, and that its factual proof was irrelevant to the legal issue presented, the District Court’s Second Order focused, and IHS continues to center its arguments, not on a back-dated FY 2005 contract, but on a prospective FY 2008 contract. Curiously, IHS offers *no* real argument about the FY 2008 appropriation and offered *no* evidence in the District Court going to that appropriation. And yet, unless the IHS concedes its argument regarding the proper start date for the contract, which the Tribe maintains should be FY 2005, *see Appellant’s Opening Brief* at 20–25, the FY 2008 appropriation would be the only one relevant to the contract and funding agreement suggested by the IHS and effectively mandated by the District Court in its Second Order.

Because IHS switches the discussion from the 2008 appropriation to the 2005 appropriation (having earlier argued that 2005 is actually the wrong date for the contract award, *Response* at 39-44), IHS avoids all of the key arguments relevant to the appropriations law issue raised in the Second Order. Thus, IHS never disputes that the time is not yet ripe to assess whether the FY 2008 appropriation is available to fully pay the Tribe's CSC requirements this year, or to assess what the consequences would be of any non-payment. IHS never disputes that the record has no proof about the condition of the FY 2008 appropriation. IHS never disputes that Congress may yet enact supplemental appropriations for FY 2008.

IHS must either concede that the Tribe's start date argument is valid and argue appropriations were not available based on FY 2005 appropriations (which IHS appears to have done), or, must provide evidence to support its claim that appropriations are not available for a prospective FY 2008 contract. Either way, the appropriations evidence offered by IHS is insufficient, even though such arguments are irrelevant to contract formation, as discussed above.

Most significantly, IHS never faces four-square the argument that, under standard appropriations law, as articulated by the Supreme Court in *Cherokee Nation* and by the Comptroller General in pertinent opinions, an appropriation like the appropriations at issue here, which is available for two or more contracts, *is* available to pay each contract in full "even if an agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made." 543 U.S. at 637-38 (emphasis in original). IHS simply says nothing to answer this point. Instead, IHS switches gears again, this time to a

discussion of irrelevant case law about government grants and subsidy programs. *See Response* at 46-47 (discussing *Star-Glo Assocs., LP v. United States*, 59 Fed. Cl. 724 (2004), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006)); *see also id.* at 33 (discussing *Star-Glo* and *Greenlee County v. United States*, 487 F.3d 871 (Fed. Cir. 2007)). The difficulty with IHS's response is that the Federal Circuit in both cited cases expressly cautioned that its rulings were *not* to be applied in the context of government contracts. *See Star-Glo*, 414 F.3d at 1355 (distinguishing *Cherokee Nation* by explaining that “[h]ere, by contrast, the government is not seeking to limit contractual liability, but to limit benefit payments. In this context, considerations of predictability are far less significant . . . .”); *Greenlee*, 487 F.3d at 879 (“The conclusion that [the Payment in Lieu of Taxes Act, 31 U.S.C. § 6901, *et. seq.*, (“PILT”)] limits the government’s liability to the amount appropriated is particularly appropriate because PILT, like the statute in *Star-Glo*, involves a benefits program *not a contract*, and ‘there is greater room’ in benefits programs to find the government’s liability limited to the amount appropriated.” (Emphasis added) (citing *Star-Glo*, 414 F.3d at 1355)).

In short, IHS offers no real answer to the appropriations law arguments offered by the Tribe and NCAI, as *Amicus Curiae*. Thus, even if this Court were to overlook IHS's errors in interpreting the ISDA and agree with IHS that the unavailability of appropriations gives IHS unilateral authority to force the inclusion of CSC language providing for *less* than the “amount for the reasonable costs” of the contract, IHS's

argument still must fail because the record does not support IHS's position that appropriations (either in FY 2005 or in FY 2008) are unavailable.

### CONCLUSION

IHS misses the Act's distinction between contract formation and contract performance and, consequently, its interpretation of the ISDA is unsupported by this Court's rules of statutory construction. The IHS goes even further by suggesting that this Court should subscribe to the IHS's fear that the Tribe is seeking to force the Agency to enter a contract that the Agency must breach immediately. Lastly, seeming to ignore its own arguments regarding the availability of appropriations, IHS fails to offer any legitimate response to the appropriations law arguments forwarded by the Tribe and NCAI, as *Amicus Curiae*.

IHS's Response demonstrates its continuing refusal to abide by the ISDA to the detriment of the Tribe and all of Indian Country. Given that, in 1994, Congress expressly limited IHS's discretion because of similar behavior, *see Appellant's Opening Brief* at 11-12, and the Supreme Court, in *Cherokee Nation*, clearly explained its findings in rejecting IHS's interpretations of its contractual duties under the ISDA, IHS's ongoing apparent inability to comprehend the ISDA is difficult to understand. This Court must therefore assist the IHS in coming to a better understanding of its statutory obligations under the ISDA.

Respectfully submitted,

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