

No. 07-2274

ORAL ARGUMENT IS REQUESTED

**In The United States Court of Appeals
for the Tenth Circuit**

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant,

v.

MICHAEL O. LEAVITT, Secretary of Health and Human Services, *et al.*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
The Honorable William P. Johnson, Judge

BRIEF FOR THE APPELLEES

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Circuit R. 28.2(C)(1), counsel are aware of no prior or related appeals.

**In The United States Court of Appeals
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLEES

JURISDICTIONAL STATEMENT

Plaintiff-appellant Southern Ute Indian Tribe (Southern Ute or Tribe) invoked the jurisdiction of the district court pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450m-1(a), seeking injunctive relief to compel the Department of Health and Human Services, Indian Health Service, to reverse its decision declining to enter into a self-determination contract with the Tribe. In an

opinion and order issued on June 15, 2007, the district court determined that Southern Ute was entitled to injunctive relief, but directed the Tribe “to prepare a form of order for injunctive relief, submit it to [the Indian Health Service] for approval as to form, and then submit it to the Court.” Doc. No. 50, Mem. Op. & Order Pl.’s Mot. for Prelim. Inj. & Defs.’ Mot. for Summ. J. filed 06/15/07 at 19 (App. Vol. II at 314). (June Order). After the parties were unable to agree on a form of order for injunctive relief, the court entered a second order on October 18, 2007, directing the parties to complete negotiations for entering into a self-determination contract within six weeks, and again ordering the parties to “submit a form of the order for injunctive relief to the Court.” Doc. No. 66 , Mem. Op. & Order Following Presentment Hr’g filed 10/18/07 at 11 (App. Vol. II at 399) (October Order).

Instead of resuming negotiations with the Indian Health Service to attempt to agree on a form of order for finalizing the injunction as directed by the district court, the Tribe filed a notice of appeal from the October Order to this Court on November 16, 2007. On December 12, 2007, this Court *sua sponte* raised the jurisdictional issue of the appealability of the district court’s order, and ordered briefing by the parties. On March 25, 2008, the Court entered an order in which it reserved judgment on the jurisdictional issue and referred the matter to the merits panel.

As discussed in our brief in support of summary dismissal,¹ and reiterated below, because the terms of an injunction were never finalized in this case, no injunction was ever entered. This Court therefore lacks jurisdiction under 28 U.S.C. § 1292(a)(1) over the Tribe's premature appeal.

STATEMENT OF THE ISSUES

The Indian Self-Determination and Education Assistance Act of 1975, (ISDA or Act), as amended, 25 U.S.C. §§ 450-450n, authorizes the Secretary of Health and Human Services (Secretary or HHS) to enter into contracts with Indian tribes for the administration of programs that the Secretary would otherwise operate. The Act also provides that “contract support costs,” which are reasonable and necessary direct and indirect costs related to the administration of a contract, shall be added to the contract. The provision authorizing such contracts, however, makes all contract payments “subject to the availability of appropriations.” 25 U.S.C. §450j-1(b).

The issues presented are:

1. Whether the October Order is appealable where the terms of the injunction have not been finalized and the district court ordered the parties to negotiate and “submit a form of order for injunctive relief” to the court.

¹ See Appellees' Memorandum Brief in Support of Summary Dismissal of Appeal for Lack of Appellate Jurisdiction, filed 02/01/08 [hereinafter IHS Mem. Br.].

2. Assuming this Court has appellate jurisdiction, did the district court correctly hold that, in view of the lack of appropriations at the time of contract negotiation, contract terms proposed by the Indian Health Service – stating the Tribe would be paid \$0 in contract support costs at that time, but that if and when funds became available, the Tribe would be paid contract support costs pursuant to Indian Health Service policy – are consistent with the ISDA’s contract funding requirements.

3. Assuming this Court has appellate jurisdiction, did the district court correctly hold that the start date of any self-determination contract negotiated by the parties should be the date upon which the Tribe begins performance of the contract.

STATEMENT OF THE CASE

A. Nature Of The Case.

This case involves a recurring issue between tribal contractors and the federal government with respect to the government’s obligation to fully fund self-determination contracts in the face of insufficient congressional appropriations. The dispute here arose in the aftermath of *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), where the Supreme Court held that the government is bound by its promise to pay contract support costs when it has entered into an ISDA contract with a tribe, and there are sufficient *unrestricted* appropriated funds available to make the payments. The Supreme Court, however, did not address the question of the liability

of the government when there is a “capped” appropriation for the total amount of funds that can be spent on all ISDA contracts. In this case, Southern Ute submitted a contract proposal to the Indian Health Service (IHS) to assume operation of the Southern Ute Health Center in fiscal year (FY) 2005. At the time the Tribe submitted its proposal, Congress had capped the amount of funds within IHS’s lump-sum appropriation that the agency could spend on contract support costs, and as a result, IHS’s appropriation for FY 2005 contract support costs was insufficient to fund both existing and new contracts. In view of *Cherokee* and the lack of appropriations for contract support costs, IHS determined that it could not enter into a contract promising to make payments from funds that Congress did not appropriate. IHS thus declined Southern Ute’s proposed contract on grounds that the amount of funds (*i.e.* for contract support costs) proposed under the contract were in excess of the applicable funding level for the contract. *See* 25 U.S.C. § 450f(a)(2)(D).

The Tribe then brought this suit for injunctive relief against Secretary of HHS Michael O. Leavitt, various other HHS officials,² and IHS (collectively, IHS),

² The complaint also named Richard H. Carmona, Surgeon General of the United States, Charles W. Grim, Director, IHS, James L. Toya, Director, IHS Albuquerque Area Office, the Public Health Service, and the Department of HHS as defendants. Pursuant to Fed. R. App. R. 43(c)(2), Steven K. Galson, Acting U.S. Surgeon General and Robert G. McSwain, Director, IHS, are substituted in their official capacities for appellees Carmona and Grim in this Court.

alleging that IHS's declination decision violated the ISDA. In an interlocutory decision issued on June 15, 2007, the district court held that IHS had no discretion to decline the Tribe's contract proposal based on insufficient appropriations to pay CSC and the Tribe's refusal to agree to contract language that differed from the ISDA's model contract. Doc. 50 at 19 (App. Vol. II at 314). The court concluded that the Tribe was entitled to injunctive relief in accordance with ISDA § 450m-1(a), and the court directed the Tribe to draft a proposed order for injunctive relief for approval as to form by IHS, and to then submit it to the court. *Id.* After the parties could not agree upon two issues concerning the form of order for injunctive relief – contract terms proposed by IHS regarding the amount of contract support costs to be stated in the contract, and the start date of the contract – the Tribe moved for a presentment hearing. In a second interlocutory order issued following the hearing, the court ruled that the contract support cost funding terms proposed by IHS do not violate the ISDA, and that the starting date of the proposed contract should be the date that the Tribe actually assumes operation of the Southern Ute Health Center. Doc. No. 66 at 6, 9 (App. Vol. II at 394, 397). The court directed the parties to complete negotiations for entering into a self-determination contract within six weeks of its order and to then “submit a form of the order for injunctive relief to the Court.” *Id.* at 11 (App. Vol. II at 399).

Southern Ute refused to resume negotiations with IHS and instead filed a notice of appeal to this Court.

B. Statutory And Regulatory Scheme.

1. *The ISDA Contracting Process.*

The ISDA requires the Secretary, “upon the request of any Indian tribe by tribal resolution,” to enter into a “self-determination” contract with a tribe or tribal organization “to plan, conduct, and administer programs” which the Secretary previously administered for the benefit of Indians pursuant to his statutory authority. 25 U.S.C. § 450f(a)(1). The Secretary has delegated authority to IHS to enter into self-determination contracts. IHS is responsible for providing primary health care for American Indians and Alaska Natives throughout the United States, either directly under the Snyder Act and the Indian Health Care Improvement Act, *see* 25 U.S.C. § 13; 25 U.S.C. § 1601; 42 U.S.C. § 2001(a), or by providing funding and support to tribes and tribal organizations under ISDA contracts. *Lincoln v. Vigil*, 508 U.S. 182, 185 (1993).

The ISDA requires the Secretary to provide funding under self-determination contracts equal to the amount of funds he otherwise would have provided if the programs were operated by IHS (the Secretarial amount or base costs). 25 U.S.C. § 450j-1(a)(1). In addition, the Act directs that contract support costs (CSC) be added

to the funding amount provided by the Secretary, “which shall consist of an amount for the reasonable costs” of certain direct and indirect costs that would not have been incurred by the Secretary if IHS operated the programs. 25 U.S.C. § 450j-1(a)(2). CSC can be broken down into three categories: (1) direct CSC, *i.e.*, administrative costs of the contracted-for program, such as unemployment taxes or workers’ compensation insurance, § 450j-1(a)(3)(A)(i); (2) “startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis” in the first year that a contract is in effect, § 450j-1(a)(5); and (3) indirect CSC, which are administrative costs that are shared by several different programs or services, §§ 450j-1(a)(3)(A)(ii), 450b(f). IHS’s funding of CSC, like all funding under the ISDA, is “subject to the availability of appropriations.” *Id.* §§ 450j-1(b), 450j(c).

A tribe or tribal organization that wishes to assume responsibility for the planning, conduct or administration of programs or services otherwise provided by IHS may submit a self-determination contract proposal to the Secretary. 25 U.S.C. § 450f(a)(2). The proposal must specify (among other things) the amount of funding requested for the contract. 25 C.F.R. § 900.8(h).

Once a tribe submits a proposal, the parties negotiate the terms of the contract and the annual funding agreement, although many of the provisions are incorporated directly from a statutorily-prescribed model agreement. 25 U.S.C. § 450l(a). A self-

determination contract has three components: (1) the contract itself, (2) modifications or amendments to the contract, and (3) annual funding agreements (AFAs). 25 U.S.C. § 450l (providing for a model contract); *id.* § 450l(c) (Model agreement, Sec. 1(e)(2)) (providing for written modifications to the contract); *id.* § 450l(c) (Model agreement, Sec.1 (b)(4)) (providing for an AFA). The funding levels for an ISDA contract are generally described in an AFA. *Id.* § 450l(c) (Model agreement, Sec. 1(f)(2)).³

Although many self-determination contracts are multi-year, tribal contractors must submit AFA proposals annually, which are then subject to individualized negotiations between the Secretary and the contractor. 25 U.S.C. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. The ISDA does not contain specific formulas or funding amounts. The Act requires, however, with a few exceptions such as when there has been a reduction in appropriations, that the funding level for existing contracts shall not be less than in previous years. 25 U.S.C. § 450j-1(b)(2); *see also* 25 C.F.R. § 900.32.

The Secretary may decline to enter into a self-determination contract only for certain statutorily-specified reasons, 25 U.S.C. § 450f(a)(2). If the Secretary issues a contract “declination,” the tribe may pursue an administrative appeals process (§

³ After the parties’ execution of a self-determination contract and accompanying AFA, all disputes arising under the agreement are subject to the Contract Disputes Act. *See* 25 U.S.C. § 450m-1(a), (d), 41 U.S.C. §§ 601-613.

450f(b); 25 C.F.R. § 900.31), or, as Southern Ute did here, “exercise the option” to proceed directly in federal district court. *Id.* § 450m-1(a).

2. *Congressional Appropriations For CSC And Current IHS Policy.*

During fiscal years prior to 1998, IHS allocated CSC funds on the basis of recommendations in congressional committee reports accompanying IHS’s annual appropriations. *See Cherokee Nation v. Thompson*, 311 F.3d 1054, 1058-59 (10th Cir. 2002), *rev’d*, 543 U.S. 631 (2005). Starting in 1998, however, Congress imposed a statutory “cap” on the amount of funds available for the payment of CSC,⁴ and this capped amount has since been the basis for CSC allocations by IHS.

As is pertinent here, for FY 2005, Congress provided that “not to exceed \$267,398,000 shall be for payments to tribes and tribal organizations for [CSC] associated with contracts . . . or annual funding agreements between [IHS] and a tribe or tribal organization . . . of which not to exceed \$2,500,000 may be used for [CSC] associated with new or expanded self-determination contracts . . . or annual funding agreements.” Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3084 (2004). After rescissions, IHS received a net appropriation of

⁴ *See* Pub. L. No. 105-83, 111 Stat. 1543, 1583 (1997) (“Not to exceed \$168,702,000 shall be for payments to tribes . . . for [CSC] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended.”).

\$263,638,179 for CSC payments for FY 2005. *See* Doc. No. 15-2, Madrano Decl. & Ex. 1 filed 10/28/05 at ¶ 9 (App. Vol. II at 224-25, 226). This amount represented no increase from FY 2004, and the appropriation left IHS with a substantial shortfall in funds to pay CSC under existing contracts. *Id.* ¶ 8 (App. Vol. II at 224). Absent certain circumstances, IHS cannot reduce funding to Tribes with ongoing contracts, 25 U.S.C. §§ 450j-1(b)(2), 450j(i). Given this statutory language, IHS determined to allocate the entire FY 2005 CSC appropriation to its existing contracts. *Id.*; *see* 25 C.F.R. § 900.32. As of October 1, 2005, IHS had obligated all but \$1.00 of its CSC appropriation.⁵ Madrano Decl. ¶ 9 (App. Vol. II at 225). The agency thus had no money to undertake additional obligations by entering into new self-determination contracts requiring payment of CSC. *Id.*

Under the current IHS policy, when a tribe assumes operation of programs, functions, services or activities (PFSAs), the tribe submits a request to IHS for CSC, called an Indian Self-Determination Fund (ISD) Request. The tribe's request is the total negotiated CSC need associated with the new or expanded programs. The funding is based on the total amount of CSC associated with the PFSA awarded from

⁵ IHS's Acting Director of Finance and Accounting, Daniel Madrano, explained in his declaration that the remaining \$1.00 balance was "most likely the result of rounding off to the nearest dollar in the accounting process." Madrano Decl. ¶ 9 (App. Vol. II at 225).

the date of assumption through the end of the AFA performance period, not to exceed twelve months. If there are not enough ISD funds in IHS's appropriation to pay all of the outstanding ISD Requests, all unfunded requests will be considered a part of a tribe's overall CSC shortfall for funding and placed on IHS's shortfall list.⁶ As additional funds become available to pay the tribes on the shortfall list, IHS will allocate 50% of the funds available to the tribes with the greatest CSC shortfalls using a bottom-up allocation methodology. The remaining 50% of the funds available will be allocated proportionately to all tribes with a CSC shortfall. IHS Manual, Part 6, Chapter 3.3.

C. Statement Of Facts.

In January 2005, Southern Ute submitted a proposal to IHS to enter into a new self-determination contract to operate the Southern Ute Health Center, with a start date of October 1, 2005. Doc. No. 4, Mem. of Law in Supp. of Pl.'s Mot. for Prelim. Inj. Relief, Exs. 1, 17, filed 09/20/05 (App. Vol. I at 44, 145). IHS notified the Tribe that Congress had failed to appropriate sufficient funds to pay CSC for new contracts in FY 2005 "and therefore it is very unlikely that any pre-award or startup costs will

⁶ As provided in 25 U.S.C. § 450j-1(c)(2), IHS annually compiles a list in which deficiencies in funds needed to provide required CSC for both new and ongoing programs to tribal contractors for the fiscal year are identified. This report is known as the "shortfall list" or "shortfall report."

be paid for FY 2005 program assumptions.” Doc. No. 4, Ex. 2, at 3-4 (App. Vol. I at 94-95). IHS further advised the Tribe that “the payment of any amounts ultimately negotiated for . . . CSC . . . will also be subject to the availability of funding at some future time.” *Id.* at 4 (App. Vol. I at 95). Contract negotiations between the parties continued for several months, with the unavailability of funds to pay the Tribe’s new CSC remaining an issue. IHS informed the Tribe that it would decline the proposal absent an agreement that IHS was under no current or future obligation to pay CSC. Doc. No. 4, Ex. 9 ¶¶ 7,8; Ex. 13 at 2 (App. Vol. I at 116, 134). The Tribe refused to enter into such an agreement, and IHS ultimately declined the contract proposal pursuant to 25 U.S.C. § 450f(a)(2)(D). Doc. No. 4, Ex. 21 at 2 (App. Vol. I at 190). The IHS explained that due to a lack of appropriated funds, “[t]he IHS is not able to add CSC to the [§ 450j-1(a)(1)] amount as required by [§ 450j-1(a)(2)] and is therefore not able to award the PFSAs identified” under the proposal. *Id.*

Southern Ute then initiated this action in district court against IHS, seeking “immediate injunctive relief” ordering IHS to reverse its declination decision and enter into a contract with the Tribe. Doc. No. 1, Compl. filed 09/15/05, at Prayer for Relief ¶ 1 (App. Vol. I at 15). The complaint alleged that: (1) the unavailability of contract support costs funding was not a basis for declination under ISDA; (2) in the alternative, IHS should have only partially declined the proposed contract with

respect to contract support cost funding; and (3) the CSC language proposed by IHS violated the publication requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Compl. ¶¶ 49, 52, 55-56, 58 (App. Vol. I at 13-15). The Tribe also filed a motion for preliminary injunctive relief, arguing that it would suffer irreparable injury to the Tribe's right to self-governance by not being able to take control of the provision of health services to its own members. Doc. No. 4, Mem. of Law in Supp. of Pl.'s Mot. for Prelim. Inj. Relief filed 09/20/05, at 17 (App. Vol. I at 39).

In response, IHS filed an opposition to the Tribe's request for a preliminary injunction, along with a motion for summary judgment, arguing that it was not obligated to enter into a contract with the Tribe due to the lack of appropriations. Specifically, IHS argued that the ISDA did not require it to undertake contractual obligations that exceeded available funding, and that the Appropriations Clause, Art. I, § 9, Cl. 7, and Anti-Deficiency Act, 31 U.S.C. § 1341, barred the agency from committing itself to pay monies that had not been appropriated. Doc. No. 15, Defs.'s Mem. in Opp'n to Pl.'s Mot. for a Prelim. Inj., filed 10/28/05, at 9-14 (App. Vol. II at 212-217).

D. Course Of Proceedings And Disposition Below.

1. *The District Court's June 2007 Order.*

In a June 15, 2007 memorandum opinion and order ruling on cross motions for summary judgment,⁷ the district court held that IHS had no discretion to decline the Tribe's proposal to enter a self-determination contract based on a lack of sufficient congressional CSC appropriations or the Tribe's refusal to agree to language not contained in the statutory model contract. Doc. No. 50 at 19 (App. Vol. II at 314). The court thus held that Southern Ute was entitled to summary judgment on those issues, and that the Tribe was entitled to injunctive relief in accordance with § 450m-1(a) of the ISDA. *Id.* The court directed the Tribe "to prepare a form of order for injunctive relief, submit it to [IHS] for approval as to form, and then submit it to the Court." *Id.* The court also stated that if the parties were unable to agree as to the form of an order, the Tribe "shall file a motion for a presentment hearing."⁸ *Id.*

⁷ The parties agreed that consolidation of the Tribe's motion for a preliminary injunction with the merits of the case was appropriate. *See* Doc. No. 38, Defs.' Response to Order to Show Cause filed 12/19/06 at 1 (App. Vol. II at 283); Doc. No. 39, Pl.'s Response to Order to Show Cause filed 12/20/06 at 2 (App. Vol. II at 290). The district court therefore treated the respective motions as cross motions for summary judgment. Doc. No. 50, Mem. Op. & Order on Pl.'s Mot. for Prelim. Inj. & Defs.' Mot. for Summ. J. filed 06/15/07 at 10 (App. Vol. II at 305).

⁸ The court also noted that there were remaining issues concerning the Tribe's cause of action under the APA and "any issue of damages." Doc. No. 50 at 20 (App. (continued...))

The parties were able to reach only partial agreement as to the proposed order. The Tribe and IHS agreed to enter into a self-determination contract in the form of the statutory model contract, 25 U.S.C. § 450l(c); however, they disagreed as to the effective date of the proposed contract. The Tribe took the position that the starting date of the contract should be October 1, 2005, the date originally proposed by the Tribe when it submitted its proposal two years earlier. IHS disagreed, however, because the Tribe had not yet provided any health care services and thus had not incurred any expenses.

The parties also disagreed about contract terms concerning the amount of CSC to be paid under the contract. The Tribe contended that the amount of CSC to be included in the annual funding agreement should be the amount stated in the Tribe's amended contract proposal of July 13, 2005. On the other hand, given the continued lack of appropriations, IHS proposed terms stating that the Tribe would be paid \$0 now, but that plaintiff would be placed on IHS's shortfall list. If and when funds become available, the Tribe would be paid CSC pursuant to IHS policy.

After the parties were unable to reach complete agreement, the Tribe filed a motion to set a presentment hearing, along with a proposed writ of mandamus. Doc.

⁸(...continued)
Vol. II at 315).

No. 51, Pl.'s Mot. to Set Presentment Hr'g filed 07/02/07 (App. Vol. II at 316 *et seq.*).

In response, the IHS filed a partial opposition to the proposed writ of mandamus and a motion for clarification of the court's June Order. Doc. No. 57, Defs.' Partial Opp'n to Pl.'s Proposed Writ of Mandamus & Mem. in Supp. of Mot. for Clarification filed 07/25/07 (App. Vol. II at 337 *et seq.*). IHS pointed out that the model agreement, 25 U.S.C. § 450*l*c (Model agreement Sec. (f)(2)(A)(i)), expressly states that an annual funding agreement must contain terms that identify both: (1) the funds to be provided; and (2) the time and method of payment. Doc. 57 at 5 (App. Vol. II at 341). IHS observed, however, that the Supreme Court in *Cherokee*, 543 U.S. at 642-43, cautioned the agency not to enter into contracts that it could not pay. Doc. 57 at 7 (App. Vol. II at 343). IHS explained that it viewed the district court's June Order to hold that while the agency must contract with Southern Ute, IHS could not be forced to promise to pay CSC in excess of the amount earmarked by Congress for that purpose. Doc. 57 at 7 (App. Vol. II at 343). In addition, IHS stated that, given the restricted congressional appropriation for CSC, it did not interpret the court's June Order to compel the agency to enter into a contract for the full amount (or any amount) of CSC the Tribe needed to run the health center without some contractual indication that the Tribe would be placed on a shortfall list and payment would be made if and when additional CSC funds became available. *Id.* at 7-8 (App. Vol. II at

343-44). IHS thus requested that the court clarify its ruling on the issue. *Id.* at 8 (App. Vol. II at 344).

2. *The District Court's October 2007 Order.*

Following a hearing on the motions, the district court issued an order on October 18, 2007, in which it agreed with IHS that the starting date of the proposed contract “will be the date on which the Tribe begins the operation of the Clinic.” Doc. No. 66 at 6 (App. Vol. II at 394). The court also determined that the CSC funding terms proposed by IHS do not contradict the statutory model agreement. *Id.* at 9 (App. Vol. II at 397). Accordingly, the court denied the Tribe’s proposed writ of mandamus and granted IHS’s motion for clarification. In so holding, the district court ordered, *inter alia*, that the parties resume and complete negotiations for entering into a self-determination contract within six weeks of the date of its decision and to “submit a form of the order for injunctive relief to the Court.” *Id.* at 11 (App. Vol. II at 399). Rather than resume negotiations with IHS, the Tribe filed this appeal.⁹

⁹ The Tribe filed a motion for stay of proceedings in the district court on the same date as its notice of appeal. Thereafter, the district court, believing that the notice of appeal divested it of jurisdiction “over those aspects of the case involved in the appeal,” *sua sponte* entered an order vacating the deadline for submission of a form of order for injunctive relief to the court. *See Order Vacating Deadline for Submission of Form of Order to the Court*, filed 11/28/07.

STANDARD OF REVIEW

Statutory construction is a purely legal question, *see United States v. Diaz*, 989 F.2d 391, 392 (10th Cir. 1993); thus, the district court's construction of the ISDA is subject to *de novo* review by this Court, *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996).

SUMMARY OF ARGUMENT

1. As a threshold matter, this Court lacks jurisdiction under 28 U.S.C. § 1292(a)(1) to review the Tribe's premature appeal of the district court's interlocutory order of October 18, 2007. The October Order, which directed the parties to negotiate and then submit a form of order for injunctive relief to the court, is a procedural order related only to the further progress of the litigation, and the actual scope of relief has not yet been defined. Hence, no injunction was entered. This Court should therefore reject the Tribe's attempt to seek piecemeal review of the district court's order, and dismiss the appeal for lack of appellate jurisdiction.

2. If this Court concludes it has jurisdiction, the Court should uphold the district court's construction of the ISDA contract funding provisions at issue here. As we discuss, the ISDA states in clear, unambiguous language that "notwithstanding any other provision" of the Act, the requirement of funding of all aspects of self-determination contracts is "subject to the availability of appropriations." 25 U.S.C.

§ 450j-1(a)(2) & (b). Each self-determination contract entered into under the Act must contain or incorporate by reference the provisions of a statutorily-prescribed model agreement. 25 U.S.C. § 450l(a). As is pertinent here, the model agreement mandates that the annual funding agreement component of a self-determination contract “shall . . . contain terms that identify . . . the funds to be provided, and the time and method of payment” *Id.* § 450l(c) (Model agreement Sec.1(f)2)(A)(i)). When Southern Ute submitted its contract proposal during mid-FY 2005, Congress had already enacted IHS’s appropriation, which restricted the amount of funds available for CSC, and IHS thus knew that it had insufficient CSC funds available for both existing and new contracts. Further, IHS was mindful of the Supreme Court’s warning in *Cherokee* that the agency should avoid making contractual promises that it cannot pay.

Thus, as we show below, the district court was correct in holding that the CSC contract terms proposed by IHS – providing that \$0 would be paid at the time, but that the Tribe would be placed on IHS’s shortfall list and paid CSC if and when funds become available – are consistent with the Act’s model agreement. The proposed terms rightly do not require immediate payment, but instead reflect that funding shall be “subject to the availability of appropriations.” Hence, the “funds to be provided” (or, the amount of CSC designated in the contract) should be \$0, which is the amount

available to be provided to Southern Ute from IHS's restricted appropriations. Further, the term stating that the Tribe will be placed on the shortfall list for payment in accordance with IHS policy if and when funds become available identifies the "time and method of payment." Therefore, as the district court aptly reasoned, the Tribe's demand for immediate payment of CSC "is illogical," and not mandated by the ISDA. Doc. 66 at 8 (App. Vol. II at 396).

3. As we demonstrate further, the district court correctly rejected the Tribe's argument that the contract negotiated by the parties should have a retroactive effective date of October 1, 2005, the date proposed in the Tribe's initial contract proposal. Because the Tribe has never assumed operation of the Southern Ute Health Center, it has incurred no costs whatsoever. Thus, giving the contract an October 1, 2005 start date would in effect award windfall damages to the Tribe. But payment of damages for services that were never provided is neither authorized nor permitted by the ISDA. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1365 (Fed. Cir. 2005). The district court therefore correctly held that the effective date of the self-determination contract should be the date on which the Tribe actually assumes operation of the health center.

In sum, if this Court determines that it has jurisdiction over the Tribe's appeal, it should uphold the district court's determination that the contract terms proposed by

IHS are consistent with the statutory model agreement, and that the effective date of the contract will be the date that Southern Ute begins performance of the contract.

ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION OVER THE TRIBE'S APPEAL.

The government's arguments discussing why this Court lacks jurisdiction over the Tribe's appeal are fully detailed in our earlier jurisdictional brief, and therefore are only briefly reiterated herein. As we have explained (Mem. Br. 11-12), it is well settled that, "[a]s a general rule, only final decisions of the district court are appealable." *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1153 (10th Cir. 2007) (citing 28 U.S.C. § 1291). Section 1292(a) creates an exception to the general rule for certain interlocutory injunctive orders, but the provision "was intended to carve out only a limited exception to the final-judgment rule of 28 U.S.C. § 1291 and the 'long established policy against piecemeal appeals.'" *Pimentel*, 477 F.3d at 1153 (quoting *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978)). Hence, the statute must be narrowly construed to "ensure that appeal as of right under § 1292(a)(1) will be available only in [limited] circumstances." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981).

The challenged order in this case is neither an injunction by its plain terms, nor in its effect. The October Order, which directs the parties to “complete negotiations and submit a form of order for injunctive relief to the Court,” (Doc. No. 66 at 11; App. Vol. II at 399), relates only to the progress of the litigation before the district court. The courts, including this Circuit, have long recognized that procedural orders designed to control the conduct of the litigation are not injunctions and therefore are not appealable under § 1292(a)(1). *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988); *Cobell v. Norton*, 334 F.3d 1128, 1138 (D.C. Cir. 2003); *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994); *Jackson v. Fort Stanton Hosp.*, 964 F.2d 980, 988 (10th Cir. 1992); *Ramirez v. Rivera-Dueno*, 861 F.2d 328, 334 (1st Cir. 1988), *cert. denied sub. nom. Quinones v. Lema-Moya*, 493 U.S. 819 (1989); *Sherpell v. Humnoke Sch. Dist.*, 814 F.2d 538, 539-40 (8th Cir. 1987); *Taylor v. Board of Educ.*, 288 F.2d 600, 604 (2d Cir.), *aff’d* 294 F.2d 36, *cert. denied*, 368 U.S. 940 (1961). Nor does the fact that the October Order contains words of restraint transform it into an injunction. *See Taylor*, 288 F.2d at 604 (“[J]ust as not every order containing words of restraint is a negative injunction within . . . § 1292(a)(1), . . . so not every order containing words of command is a mandatory injunction within that section.”).

Indeed, to date, no appealable injunction has been entered in this case. The district court described its June Order as having determined “the purely legal issue whether the [IHS] had discretion under the [ISDA] to decline to enter into a contract” with the Tribe to assume operation of the Southern Ute Health Center. *See* Doc. No. 66 at 1 (App. Vol. II at 389). The court decided that the Tribe was entitled to summary judgment on its causes of action with respect to that issue and stated that the Tribe was “entitled to injunctive relief” in accordance with the ISDA; but it did not enter a judgment specifying that relief. Rather, the court directed the Tribe to prepare a form of order for injunctive relief, to submit it to IHS for approval as to form, and to then submit the proposed order to the court. Doc. 50 at 19 (App. Vol. II at 314). The parties reached a stalemate in their negotiations, and no form of order was submitted by the parties. Thus, no injunction was ever entered. *See El-Tabech v. Gunter*, 992 F.2d 183, 185 (8th Cir. 1993) (As a technical matter, the court’s statement that it had entered judgment on plaintiffs’ claim for injunctive relief amounted to “no more than a statement that plaintiffs [were] entitled to an injunction [T]he fact that the court asked for a plan of implementation is a positive indication that it was merely indicating an intention to issue an injunction in the

future.”).¹⁰ Similarly, the October Order is not an injunction, but is instead a non-appealable procedural order related only to the further progress of the litigation.

As we also discussed (Mem. Br. 15-20), the Tribe has failed to satisfy the three “*Carson* factors” necessary to demonstrate that the October Order is immediately appealable because it has the practical effect of an injunction, *i.e.*, that the order is injunctive in nature and “might have a serious, perhaps irreparable, consequence, and that the order can be effectively challenged only by immediate appeal.” *Carson v. American Brands*, 450 U.S. at 84 (internal quotation marks omitted). *See also Hutchinson v. Pfeil*, 105 F.3d 566, 569-70 (10th Cir. 1997); *Tri-State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989).

Moreover, the October Order is simply a permissible clarification of the June Order. The June Order itself only expressed the district court’s intention to enter an injunction in the future. That intention was predicated on the parties agreeing upon a form of order for injunctive relief. *See Mercer*, 40 F.3d at 895; *El-Tabech*, 992 F.2d at 185. As we discussed (Mem. Br. 20-21), the October Order is entirely consistent

¹⁰ IHS certainly did not view the court’s June Order as an appealable injunction and therefore reserved consideration of whether to appeal the district court’s ruling that it lacked discretion to decline to enter into a self-determination contract under § 450f(a)(2)(D).

with the earlier order because it does not alter the status of the parties, but simply “restates that relationship in new terms.” *Pimentel*, 477 F.3d at 1154 (internal quotation marks and citation omitted). The district court clarified in the October Order that its June Order “concerned ISDA language only as it related to *declination* of the proposed contract.” Doc. No. 66 at 9 (App. Vol II at 397). On the other hand, the district court’s October Order considered contract terms proposed by IHS and concluded that the terms were “envisioned by, and inherently compl[y] with, the model agreement language in the ISDA.” Doc. No. 66 at 6-7 (App. Vol. II at 394-95) (citing Model agreement Sec.1(f)2)(A)(i) (annual funding agreement shall contain “terms that identify . . . the funds to be provided, and the time and method of payment).

In short, the Tribe has failed to establish that the October Order satisfies the requirements for immediate appeal under § 1292(a)(1). Hence, the “the general congressional policy against piecemeal review . . . preclude[s] interlocutory appeal.” *Carson*, 450 U.S. at 84. For these reasons, as more fully elaborated upon in our earlier memorandum brief, the Tribe’s appeal should be dismissed for lack of appellate jurisdiction.

If this Court disagrees with our jurisdictional arguments and determines that the district court’s October Order is subject to immediate review on interlocutory

appeal, the government submits, as addressed in Part II below, that the district court’s interpretation of the ISDA – holding that inclusion of terms in the self-determination contract acknowledging the current unavailability of sufficient CSC funding complies with the Act – was correct and should be upheld. As we discuss further, in Part III, the district court rightly concluded that any self-determination contract entered into between the parties should have as its start date the date upon which the Tribe assumes operation of the contracted program.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CONTRACT TERMS PROPOSED BY IHS DO NOT VIOLATE THE ISDA.

Statutory construction begins with the plain language of the statute under scrutiny. *Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979); *Colorado High Sch. Activities Ass'n v. National Football League*, 711 F.2d 943, 945 (10th Cir. 1983). Thus, “[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning.’” *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted); see *NISH v. Rumsfeld*, 348 F.3d 1263, 1268 (10th Cir. 2003).¹¹

¹¹ Curiously, the Tribe devotes several pages of its brief (at 10-12) to an argument suggesting that the district court improperly accorded *Chevron* deference to IHS in
(continued...)

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

The Tribe argues that the district court's decision holding that IHS's proposed CSC contract terms are permissible "misinterprets the ISDA and requires the Tribe to accept contract terms that violate ISDA." Appellant's Br. 12. It is the Tribe, however, that misinterprets the statute. As discussed previously, in providing funds for a self-determination contract, the ISDA requires the Secretary to provide direct program costs of not less than he would have otherwise provided if IHS directly operated the contracted program (the Secretarial amount), as well as an amount for the reasonable costs for certain administrative expenses associated with operation of the program – *i.e.*, CSC. 25 U.S.C. § 450j-1(a)(1) & (2). However, the ISDA

¹¹(...continued)

construing the ISDA. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the agency never claimed that its interpretation was entitled to deference, and the court never so ruled. *Chevron* was never cited or discussed by the court. Indeed, the Tribe concedes as much. *See* Br. 11 n.5. In any event, as discussed in the text, because Congress has directly spoken to the very matter at issue, no construction of the statute is necessary because both the courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843; *see Pharmanex v. Shalala*, 221 F.3d 1151, 1154 (10th Cir. 2000). Further, because the statutory language is unambiguous, there is no merit to the Tribe's additional argument (Br. 14 n.6) that the canon of statutory construction favoring Indians is applicable here. *See Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000) (canon favoring Indians "appl[ies] only where the statute at issue is ambiguous"), *aff'd*, 534 U.S. 84, 93-95 (2001).

restricts the applicable funding level for a self-determination contract, including funding for CSC. The Act expressly states: “Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter *is subject to the availability of appropriations*” *Id.* § 450j-1(b); *see also id.* § 450j(c) (“The amounts of [self-determination] contracts shall be *subject to the availability of appropriations.*”) (emphasis added); *see Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660, 667 (9th Cir. 2002) (“The phrase ‘subject to the availability of appropriations’ is ‘clear and unambiguous’”) (citation omitted); *Babbitt v. Oglala Sioux Tribal Pubic Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999) (same), *cert. denied*, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd. v. Babbitt* 87 F.3d 1338, 1345 (D. C. Cir. 1996) (same). Further, absent certain circumstances, the ISDA prohibits IHS from reducing the amount of funds provided to tribal contractors with existing contracts. *Id.* § 450j-1(b)(2) (“The amount of funds required [under ongoing self-determination contracts] shall not be reduced by the Secretary in subsequent years . . .”).

During the fiscal year at issue, congressional appropriations earmarked for CSC payments were insufficient to fund both existing contracts and new contract proposals. Thus, IHS could spend only as much money as Congress specifically appropriated for that purpose. *See Lincoln v. Vigil*, 508 U.S. at 193 (“[A]n agency is

not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes”); *Oglala*, 194 F.3d at 1378 (“[I]n the face of congressional under-funding [of CSC], . . . [the] agency can only spend as much money as has been appropriated for a particular program.”); *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345 (D.C. Cir. 1996) (Congress “clearly” included the “subject to availability of appropriations” proviso of § 450j-1(b) “to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act.”). *See also Cherokee*, 543 U.S. at 643 (The phrase “‘subject to the availability of appropriations’ . . . makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.”).

1. *The amount of CSC designated in the contract should be \$0, which is the amount available to be provided to Southern Ute from IHS’s restricted appropriations.*

The ISDA surely does not require IHS to make a contractual promise “which it must breach up front.” *See* Doc. No. 66 at 9 (App. Vol. II at 397). The district court, therefore, correctly determined that the contract terms proposed by IHS, providing that the Tribe would be paid \$0 in CSC, but that the Tribe would be placed on IHS’s shortfall list and later paid CSC if and when funds became available, is

permissible under the Act. The Tribe insists, however, that the district court's construction of the Act "turned the ISDA's statutory funding scheme upside down," (Br. 13), because the full statutory funding amount, including CSC, must be added to the contract and "is excused only if appropriations are subsequently found not to be legally available." *Id.* at 14. Thus, according to Southern Ute, to address the "availability issue . . . first . . . is precisely opposite of what the Act commands," and "renders both 25 U.S.C. § 450j-1(b) and the opening clause of model agreement § 1(b)(4) nugatory." Br. 15. The Tribe again misconstrues the statutory scheme.

As discussed previously, a self-determination contract is composed of three parts: (1) the contract itself, (2) modifications or amendments to the contract, and (3) annual funding agreements. 25 U.S.C. § 450l (providing for a model contract); *id.* § 450l(c) (Model agreement, Sec. 1 (e)(2) (providing for written modifications to the contract); *id.* § 450l(c) (Model agreement, Sec.1 (b)(4) (providing for an AFA). Although the ISDA provides that "[t]here shall be added to the [Secretarial] amount . . . contract support costs," § 450j-1(a)(2), it is error for Southern Ute to suggest that this provision mandates a statutory formula for calculation of CSC. Rather, CSC funding levels are the result of annual negotiations between IHS and a tribe, and are reflected in an AFA.

Here, in their negotiations following the district court’s June Order ruling that IHS could not decline to enter into a self-determination contract based on the Tribe’s refusal to agree to language outside of the model contract,¹² the parties agreed to include the contract language contained in the Act’s model agreement. *See* 25 U.S.C. § 450l(c). However, the model agreement requires that “[t]he annual funding agreement under this Contract shall . . . contain terms that identify . . . *the funds to be provided*, and the time and method of payment.” *Id.* ((Model agreement Sec.1(f)(2)). Because the AFA is an integral and inseparable component of the ISDA contract, the contract must necessarily include a term identifying the amount of CSC funding.¹³

¹² It is important to emphasize that IHS has not conceded that its declination decision violated the ISDA. As discussed earlier (*supra* at 24 & n.10), the agency does not view either of the district court’s rulings to constitute an appealable injunctive order and therefore has reserved consideration of its options to seek review of the district court’s ruling on this issue.

¹³ For this reason, the Tribe’s argument (Br. 25-26) that the district court exceeded its authority in this case by “dictating” the terms of the proposed AFA lacks merit. The Tribe asserts (*id.* at 26) that the terms of the AFA were not at issue in this case, because the AFA comes into play only after execution of a self-determination contract. This is a rather astonishing claim, given the fact that the Tribe expressly invited the district court to “reach[] into the AFA to dictate its substance” in this case. *See* Appellant’s Br. 26. The proposed writ of mandamus accompanying the Tribe’s motion to set a presentment hearing states, in pertinent part:

IT IS ORDERED THAT

(continued...)

As the district court correctly determined in this case, in the face of a congressionally-capped appropriation that had already been expended, the agency could not lawfully agree to the Tribe's demand that IHS promise to immediately pay the Tribe the full amount of its CSC need. *Cf. Star-Glo Assocs. LP v. United States*, 59 Fed. Cl. 724 (2004) (citrus growers' claims were barred where federal funding to compensate owners of groves destroyed by citrus canker was subject to statutory cap and available funds were exhausted before suit was commenced), *aff'd on other grounds*, 414 F.3d 1349 (Fed. Cir. 2005), *cert. denied* 547 U.S. 1147 (2006); *accord Greenlee County v. United States*, 487 F.3d 871, 878-79 (Fed. Cir. 2007); *see also Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.) (If a statute imposes a statutory cap, payments in excess of the cap

¹³(...continued)

....
2. The defendants are directed to enter into annual funding agreements with the Southern Ute Tribe for Fiscal Years 2006 and 2007, and immediately begin negotiations for the FY 2008 annual funding agreement.

3. The defendants are directed to use the funding amounts contained in the Application as the funding to be contained in the annual funding agreement for FY 2006. . . .

Apparently because the district court rejected the Tribe's proposed language in favor of the CSC terms proposed by IHS, the Tribe now argues that the issue was not properly before the court. But the Tribe can't have it both ways.

would violate the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)), *cert. denied*, 516 U.S. 820 (1995) . Rather, the agency could properly agree to a provision that the Tribe would be paid \$0 for CSC at the time of contract execution, but that the Tribe would be placed on IHS's CSC shortfall list, and that it would be paid CSC if and when funds become available.

Southern Ute argues that by addressing the availability of appropriations issue first, the district court's analysis upsets the statutory scheme. *See* Appellant's Br. 15; NCAI's Amicus Br. 10-11. On the contrary, it is the Tribe's approach that turns the ISDA on its head. Indeed, as the district court observed, given the Tribe's concession that "[n]othing in the ISDA . . . would require [IHS] to pay funds that have not been appropriated,"¹⁴ its "refusal to waive immediate payment of CSC is illogical." Doc. 66 at 8 (App. Vol. II at 396). The district court further opined:

[The Tribe] should have no objection to the inclusion of terms in the annual funding agreement which reflect the practical ramifications of the current statutory cap on available appropriations. On the other hand, if such language is omitted, it is abundantly clear that the Government will be forced to enter a contract which it must breach up front, but which it will ultimately be allowed to breach.

¹⁴ *See* Doc. No. 25, Pl.'s Resp. to Defs. Mot. for Summ. J. filed 11/30/05 at 6 (App. Vol. II at 255).

Id. at 8-9 (App. Vol. II at 396-97). As the court aptly concluded, ruling in favor of the tribe on this issue would not only have been “contrary to ISDA provisions, it would prove to be an exercise in futility by opening the door to unwinnable – and perhaps frivolous – breach of contract claims.” Doc. 66 at 9 (App. Vol. I at 397).

2. *The CSC terms proposed by IHS are consistent with the statute’s model contract.*

The Tribe’s various arguments regarding the ISDA’s contract formation requirements miss the mark.¹⁵ *See* Appellant’s Br. 16-19. IHS has not attempted to force the Tribe to agree to terms that violate the statute. Rather, after suing IHS and securing a ruling that the agency is required to contract with the Tribe, the Tribe proposed one version of CSC funding language, and IHS proposed different terms. The Tribe then returned to the district court and asked it decide whether IHS’s proposed terms violate the ISDA. The district court correctly held that they do not. It is the Tribe, therefore, that is trying to force the agency to enter into a self-

¹⁵ The Tribe (Br. 16) also misplaces its reliance on 25 U.S.C. § 450m-1(b), which provides that the Secretary may not “revise or amend” a self-determination contract without a tribe’s consent. That provision has no application here because it plainly refers to existing contracts, and the dispute in this lawsuit concerns efforts by the parties to agree to the terms of a new contract. Similarly, because no contract exists, the Tribe is wrong in arguing that IHS has attempted to “unilaterally modify the contract terms.” Appellant’s Br. 18.

determination contract containing terms that are inconsistent with the statutory scheme, terms that IHS would necessarily breach immediately upon its execution.

Moreover, contrary to Southern Ute's argument (Br. 16) IHS's proposed terms do not eliminate CSC funding. Rather, the provision stating that the Tribe 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," § 450l(c) (Model agreement Secs. 1(b)(4) & (f)(2)(A)(i)), and does not condition approval of the contract upon Southern Ute's agreement to language outside of the model contract.

3. *Inclusion of IHS's proposed CSC contractual terms is entirely consistent with the intent and purpose of the ISDA.*

Nor is there any merit to Southern Ute's argument that IHS's interpretation frustrates the intent and purpose of the ISDA by eliminating the Tribe's alleged statutory right to obtain CSC "even if appropriations are legally available to do so." Appellant's Br. 19. First, the Tribe's argument ignores the reality that at the time it submitted its contract proposal in January 2005, Congress had already passed the FY 2005 appropriations – which expressly restricted the amount of CSC funding for all ISDA contracts – and there was inadequate funding to pay any CSC for the Tribe's proposed new contract. Thus, "no legally available" appropriations existed.

Second, the Tribe misconstrues the Supreme Court’s holding in *Cherokee*, 543 U.S. 631, by arguing that “[i]f IHS is incorrect [about the availability of its appropriations], and CSC funds are available, the Tribe has a right under the ISDA to be paid (or recover damages for any non-payment . . .).” In *Cherokee*, the Supreme Court addressed the question of the government’s obligation to pay when it had already entered into a self-determination contract with a tribe that included an AFA containing the government’s promise to pay CSC. The Court characterized the government’s argument to be that “it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so.” 543 U.S. at 636. In rejecting the government’s arguments, the Court noted that Congress had appropriated “far more” than the amounts at issue and that “[t]hese appropriations . . . contained no relevant statutory restriction.” *Id.* at 637. Importantly, the *Cherokee* Court also explained that the subject-to-the-availability-of-appropriations proviso “is often used with respect to Government contracts . . . normally [to] make[] clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year.” *Id.* at 643. “It also makes clear, the Court explained, “that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the

availability of appropriations.” *Id.* The Court concluded that the proviso did not support the government’s position in *Cherokee* because Congress had in fact appropriated unrestricted funds that were adequate to pay the tribe. In contrast, in our case, there is no existing contract, CSC funding is subject to an express statutory cap, and the lack of adequate funding was a known fact at the time that the Tribe submitted its contract proposal.¹⁶

In any event, the provision proposed by IHS would entitle Southern Ute to be paid CSC in accordance with IHS’s shortfall policy if and when funds later become available. Thus there is no support for the Tribe’s contention that the Tribe “might never receive its statutorily-required CSC” even if Congress enacted a supplemental

¹⁶ As the district court here acknowledged, “the Supreme Court [in *Cherokee*] did not decide what the Government’s obligations to pay CSC would be if Congress explicitly prohibited the use of unrestricted funds to meet these obligations. Furthermore, the Supreme Court hinted that the Government’s obligations to pay CSC might be different if Congress did not appropriate adequate unrestricted funds.” Doc. No. 50 at 18 (App. Vol. II at 313). The district court also observed that the Supreme Court’s statement that IHS could seek protection of funds by requesting statutory earmarks “appears to be another suggestion that the Government’s obligation to pay CSC may be different when there are no unrestricted funds available to pay them.” *Id.* Finally, the court noted “that the funding for FY 2005 specified that the money earmarked for CSC was the only money to be used to pay for CSC.” *Id.* at 18-19 (App. Vol. II at 313-14). *See also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1103 (D. N.M. 2006) (“[I]t is doubtful that the [Supreme Court’s] holding in *Cherokee Nation* would have an effect on ISDA contract disputes for contracts during statutory cap years . . .”).

appropriation that increased the available amount of CSC funding. *See* Appellant’s Br. 20.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE START DATE OF THE CONTRACT SHOULD COMMENCE UPON THE DATE THE TRIBE ACTUALLY BEGINS PERFORMANCE.

The Tribe argues (Br. 20) that its self-determination contract was “approved by operation of law” when the district court held in its June Order that IHS could not refuse to contract based on the declination criteria relied upon by the agency. Thus, according to the Tribe, the starting date of the contract should be made retroactive to October 1, 2005, the date that it originally proposed for its assumption of the operation of the health center. *Id.* at 20-21. This argument is specious.

Southern Ute has never assumed operation of the health center and therefore has incurred no expenses either in the form of money for operating programs (the Secretarial amount), § 450j-1(a)(1), or CSC for administrative activities conducted by the Tribe as an ISDA contractor. *Id.* § 450j-1(a)(2). Instead, IHS has continuously operated the health center. Thus the program funds that would have been available under a self-determination contract have already expended by IHS in its operation of the health facility. Because IHS and *not* the Tribe expended the program funds necessary to run the facility, and the Tribe incurred *no* costs whatsoever, giving the

contract an October 1, 2005 start date would in effect award windfall damages to the Tribe.

Payment of damages for services that were never provided is neither authorized nor permitted by the ISDA. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1365 (Fed. Cir. 2005). In *Samish*, the plaintiff tribe alleged that the government prevented the tribe from obtaining self-determination contracts by wrongfully refusing to accord it federal recognition, and sought program money and CSC for the years during which it was allegedly deprived of a contract. *Id.* at 1362-63. The Federal Circuit rejected the tribe's position, concluding that absent a contract, the ISDA did not confer a right to either type of funding. *Id.* at 1365. The court determined that since program funds are derived from benefits arising under statutes other than the ISDA,¹⁷ the existence of a damage remedy "cannot be determined by reference to ISDA itself." *Id.* at 1365. Instead, such a remedy could only be determined according to the terms of the actual self-determination contract that was the mechanism for directing those benefits. *Id.* The court declared that awarding damages "for contract support costs never incurred, on contracts never

¹⁷ *See, e.g.*, the Snyder Act, 25 U.S.C. § 13. As the Federal Circuit explained further, "[b]ut the Supreme Court has already determined that the Snyder Act does not provide a damage remedy because it does not require the expenditure of general appropriations, on specific programs, for particular classes of Native Americans." *Samish*, 419 F.3d at 1366 (citing *Lincoln v. Vigil*, 508 U.S. at 194).

created,” would provide the tribe “nothing but a windfall” which would not advance the purpose of § 450j-1(a)(2), “namely, removing the financial burden incurred by tribes and tribal organizations when implementing federal programs under self-determination contracts.” *Id.* at 1367.

The Federal Circuit’s conclusion that the ISDA did not “provide a damage remedy for past program money, or [CSC] never incurred,” *Samish*, 419 F.3d at 1367, is instructive here. If there can be no damage remedy for program money where a tribe never ran a program, *see id.* at 1366, then Southern Ute cannot receive a retroactive start date for determination of its funding because the Tribe could not and did not incur any administrative costs, because it did not have a self-determination contract to run the health center from October 1, 2005 to the present. Accordingly, the district court correctly rejected the Tribe’s assertions that the contract should be given a retroactive starting date of October 1, 2005.

The Tribe’s attempt to distinguish *Samish* is unavailing. *See* Appellant’s Br. 24-25. Southern Ute’s status as a federally recognized tribe “for the entire period in which it has sought to assume responsibility” for the health center is not a distinction that makes a difference here. *See id.* at 24. Rather, the significance of *Samish* lies in its holding that a tribe cannot recover funding under the ISDA for services that were never rendered.

Further, as the district court here found, the Tribe misplaces its reliance on *Crownpoint Inst. of Tech. v. Norton*, No. 04-531 (D.N.M. Sept. 19, 2005). In *Crownpoint*, the plaintiff tribal organization had been operating the program in question through grant funds at the time it sought CSC. Thus, the plaintiff actually incurred the CSC that were eventually awarded after the court determined that the self-determination contract should have been approved. Because the plaintiff had already been operating the program, the court “deemed” that the contract had been approved as of the date of the proposal to assure that plaintiff would receive the CSC that had already been incurred. *In re Pascua Yaqui Tribe of Arizona*, No. A-99-61, Decision No. 1692 (HHS Appeals Bd. Jan. 12, 1999), is also distinguishable. There, the agency partially declined plaintiff’s proposed self-determination contract and at the same time approved the tribe’s CSC request and placed the request on the agency’s waiting list for FY 1997. At issue was whether a FY 1999 appropriations bill barring expenditures for “new” self-determination contracts applied to the self-determination contract partially declined by the agency in 1997. The Departmental Appeals Board held that “any contract approved on appeal should not be viewed as a new fiscal year 1999 contract within the meaning of the appropriations bill but rather as a prior year contract that was unlawfully declined” in 1997. *Pascua*, slip op. 5-6. The Board therefore concluded that treating the contract as relating back to

the date of the partial declination “[wa]s consistent with IHS’s commitment in the partial declination letter to place [the tribe’s] proposal [on the waiting list] for contract support costs with other fiscal year 1998 program starts with a request date of July 21, 1997.” *Id.* at 6.

The Tribe grasps at straws when it argues (Br. 21-23) that a provision setting the contract’s effective date as the date that the contractor actually begins performance is somehow inconsistent with the ISDA’s goal of assuring maximum participation by tribes in the planning and administration of programs and activities serving Indian communities. Indeed, Southern Ute’s contention (Br. 21) that a requirement that its contract’s effective date reflect the date the Tribe actually assumes operation of the health center would frustrate the Act’s purposes “by subjecting ISDA contracts to additional rounds of negotiation and possible declination,” is unfounded. Contrary to the Tribe’s assertions, the Tribe would suffer no prejudice or punishment for appealing the declination decision because, as the district court found, the Tribe would be awarded the same contract as if it had not been declined, subject to recalculation of the amount of need as of the starting date of the contract. Doc. No. 66 at 6 (App. Vol. II at 394). In so ruling, the court accepted IHS’s representation that the Tribe would be placed immediately on IHS’s

shortfall list, “and prioritized on the basis of need, and not according to waiting time,” *id.*, and noted that IHS “will be held to adhere to this representation.” *Id.* at n.5.

IV. THERE IS NO MERIT TO AMICUS NCAI’S ARGUMENTS.

Amicus National Congress of American Indians (NCAI) presents several arguments in support of Southern Ute’s appeal, none of which, however, is persuasive. NCAI argues that the ISDA’s “subject-to-the-availability-of-appropriations” provision is not helpful to the government’s position because that language limits IHS’s obligation to pay a contract, not to award a contract. Thus, according to NCAI, the question of the availability of appropriations should only be addressed, “if ever,” in the context of a breach of contract action. NCAI’s Amicus Br. 10. Offering to give this Court a lesson in “basic appropriations law,” *id.* at 12, NCAI undertakes to explain the differences between the “lump-sum” appropriations rule and the “specific line-item appropriations” rule. NCAI Br. 12-16 (citing, *e.g.*, *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (discussing lump-sum appropriation, which is available to pay several programs or projects); *Sutton v. United States*, 256 U.S. 575, 579-80 (1921) (discussing specific line-item appropriation where funding is restricted to a particular purpose or project)). Declaring that the lump-sum rule is applicable to IHS’s FY 2008 appropriation, NCAI

argues that IHS's appropriations are legally available to pay all CSCs associated with Southern Ute's contract. NCAI Br. 16-17.

Regardless of the relative merits of NCAI's description of the body of appropriations law in the abstract, the main problem with its arguments here is that IHS's FY 2008 appropriation was not available at the time the parties were negotiating. Southern Ute's proposed contract was submitted in January 2005, and the parties' negotiations were based on the FY 2005 appropriation. *See* Doc. 4, Ex. 2 at 3-4 (App. Vol. I at 94-95) ("It is important to point out now . . . that the Congress failed to add any new money to the CSC appropriation this year and therefore it is very unlikely that any pre-award or startup costs will be paid for FY 2005 program assumptions."). And contrary to NCAI's contentions (Br. 4), the Madrano declaration and IHS's budget sheets included in the record here disclose that IHS's FY 2005 restricted appropriations for CSC were fully allocated to pay recurring CSC for existing ISDA contracts that remained in effect or were required to be renewed. *See* Doc. 15-2, Madrano Decl. ¶ 8 & Exs. (App. Vol. II at 224, 226-43).

Moreover, contrary to NCAI's suggestion (Br. 4, 9, 14-22), the Supreme Court in *Cherokee* did not hold that the ISDA provides a statutory right to CSC. Rather, as discussed previously (*supra* at 36-37), the *Cherokee* Court held, in a breach of contract case, that the subject to the availability of appropriations language did not

excuse the government from its promise to pay CSC where there was no express statutory restriction on the amount of CSC funding available, and IHS had sufficient funds from its general lump-sum appropriation to pay the CSC promised in the self-determination contract.

Nor is there any merit to NCAI's contention (Br. 27-28) that the holdings in cases like *Oglala, supra*, are no longer viable after *Cherokee*.¹⁸ *Oglala* involved a capped appropriation and the Federal Circuit ruled that "in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program." *Oglala*, 194 F.3d at 1378. In contrast, in *Cherokee*, which also involved a case decided by the Federal Circuit, the Supreme Court rejected the government's argument that statements in an appropriation bill's legislative history indicated congressional intent to impose a statutory cap on the payment of CSC. Nothing in the Supreme Court's decision, however, suggested that the holding would be same where there was an express statutory funding restriction. Indeed, Judge Dyk, the author of the Federal Circuit's decision in *Cherokee*, 334 F.3d 1075, wrote in a later case construing the Supreme Court's *Cherokee* ruling that both courts had "left open the possibility" that in other circumstances appropriations language "might be

¹⁸ Southern Ute apparently does not share NCAI's reading of *Oglala*, as the Tribe cites that authority approvingly in its brief. See Appellant's Br. 14.

construed to impose a cap.” *Star-Glo*, 414 F.3d at 1354; *see also Pueblo of Zuni*, 467 F. Supp. 2d at 1103 (expressing doubt that Supreme Court’s decision in *Cherokee* would control ISDA contract disputes for claims arising during statutory cap years). Simply put, the Supreme Court’s decision in *Cherokee* did not resolve the issue presented here.

CONCLUSION

For the foregoing reasons, the Tribe's appeal should be dismissed for lack of appellate jurisdiction. If the Court determines that it has jurisdiction, the district court's October 2007 order, holding that the contract terms proposed by IHS are permissible under the ISDA and that the effective date of the self-determination contract will be the date upon which the Tribe assumes operation of the health center, should be affirmed.

Respectfully submitted,

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JUNE 2008

STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity of the ISDA statutory scheme and the importance of the issues involved, oral argument may assist the Court in resolving the dispute in this case.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2008, I filed and served the foregoing “BRIEF FOR THE APPELLEES” by submitting a digital copy by electronic mail and causing the original and 7 copies to be dispatched to the Clerk of this Court by Federal Express overnight delivery, and by submitting a digital copy by electronic mail and causing copies be served upon the following by Federal Express overnight delivery:

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 11,442 words. The text of the brief complies with the type-volume limitations, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)(B) and 10th Circuit Rule 32(a).

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DIGITAL SUBMISSION CERTIFICATION

I hereby certify that all required privacy redactions have been made, that the foregoing “BRIEF FOR THE APPELLEES” is an exact copy of the written document filed with the clerk, and that the digital form of the Brief has been scanned for viruses using Trend Micro OfficeScan program version 6.5 (last virus pattern release date 06/16/08) and is virus-free.

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