

No. 08-2262

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**RAMAH NAVAJO CHAPTER, *et al.*,
Plaintiffs-Appellants,**

v.

**KENNETH L. SALAZAR, *et al.*,
Defendants-Appellees.**

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

APPELLANTS' SUPPLEMENTAL BRIEF

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I. ASNA CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF GOVERNMENT CONTRACT LAW.

Much of federal contract law is concerned with risk-shifting. Given the one-sided nature of the relationship, contractors must know exactly what risks they assume, especially when entering into contracts to operate vital government services. In *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-38, 639-40, 643 (2005), the Supreme Court held that ISDA contracts are construed under ordinary principles of government contract law. That case concerned the very same six-word clause at issue here, “subject to the availability of appropriations,” appearing in 25 U.S.C. § 450j-1(b) and § 450l(c), sec.1(b)(4). Citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), *Cherokee* held that the government “should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.” 543 U.S. at 640. Under both *Cherokee* and *Ferris*, it is improper to shift that risk to contractors who provide the government with the full benefit of the bargain when they are not told in advance they will not receive the full contract price. Aplt. Brf. 12-17; Reply Brf. 30-32.

Arctic Slope Native Association v. Sebelius, No. 2010-1013, ___ F.3d ___ (Fed. Cir. Dec. 15, 2010) (“ASNA”), disregarded much of the Supreme Court’s analysis and misconstrued *Ferris*. Under ASNA’s construction of ISDA, tribal contractors cannot know what they will be paid until *after* they have performed, and they have no recourse if it is not what they were promised. According to the

Federal Circuit, the § 450j-1(b) availability clause and the “not to exceed” language in the appropriations acts combine to shift all risk to the contractor, even though a particular contractor still has no way of knowing that a multi-hundred million dollar appropriation many times greater than his individual contract will be insufficient to cover that contract. That is wrong, for under more than a century of government contract law all that matters is that the appropriation is sufficient to pay the individual contract in question. The “not to exceed” caps at issue here and in *ASNA* provide a particular contractor with no more notice of whether and how much its full contract price will be reduced than does the § 450j-1(b) “availability of appropriations” clause construed in *Cherokee*.

The *Cherokee* Court was well aware that, starting in 1994 (BIA) and 1998 (IHS), Congress had capped the contract support cost appropriations,¹ yet the Court did not limit its ruling to the facts before it. Instead, the Court squarely endorsed the *Ferris* Rule, which holds that a contractor who provides the government with the full benefit of the contract is entitled to recover its full contract price whenever the appropriation is sufficient to pay it, *even if* the appropriation is insufficient to pay everyone’s contract price.

¹ See, e.g., Brief for Tunica-Biloxi Tribe of Louisiana, et al. as *Amici Curiae* Supporting Petitioners at 4, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (Nos. 02-1472 & 03-853), 2004 WL 1400260.

Cherokee confirms a fundamental principle of federal appropriations law: an “appropriation” is “legally ‘available’” for a “legal expenditure” if the proposed expenditure meets the three-prong purpose-time-amount test. Aplt’s Brf. 24-25 (discussing GAO Redbook 4-6 (2004)). This test is met here. This is why the Supreme Court in *Cherokee*, 543 U.S. at 643, cited *Ferris* when discussing ISDA’s “availability of appropriations” clause—to make plain that the clause simply means that if sufficient funds were “legally available” to pay a specific contractor, then the government is liable for the full contract price, precisely as *Ferris* holds. As the Supreme Court also said—again citing *Ferris*—an insufficiency of an appropriation to pay all of the government’s contracts is immaterial to the question of whether funds are available to pay a particular contractor, so that it is the government, and not the contractor, that bears the risk of an insufficiency. *Id.* at 640.

The appropriation caps at issue here, like those funding many government contracts, are purpose-limited and amount-limited, but not contractor-limited. The government has never contended that the “not to exceed” caps at issue here alter the mandate of 25 U.S.C. § 450j-1(g) under which “the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section. . . .”; nor has Congress rescinded ISDA contractors’ right to recover contract damages for any breach. 25 U.S.C § 450m-1. *See* Aplt’s

Brf. 1, 10, 52-55; Reply Brf. 30-32. Section 450j-1(g) is an imperative, a directive which cannot be swept away by ignoring it. Aplt's. Brf. 23. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.") (citation omitted). The ISDA's section 450j-1(g) was a central feature of the 1994 amendments, which were enacted to ensure stable and adequate funding, especially of contract support costs. S. Rep. No. 103-374, at 2-3, 9 (1994). Inexplicably, ASNA fails even to mention § 450j-1(g), much less make any attempt to harmonize its command with the rest of the statute or with the contract incorporating the statute.

II. UNLIKE ISDA CONTRACTS, THE CONTRACTS IN *LEAVELL* AND *WINSTON* EXPLICITLY SHIFTED THE RISK TO THE CONTRACTORS.

The contracts in *C.H. Leavell & Co. v. United States*, 208 Ct. Cl. 776 (1976), and *Winston Bros. Co. v. United States*, 131 Ct. Cl. 245 (1955), are strikingly different from those at issue here or in ASNA, *Cherokee* or *Ferris*.

Words are important, particularly in federal contract law where the contract is drafted by the government. Different "availability" clauses carry different meanings. In *Leavell* the parties' contract included a nine-part 1,161-word "Funds Available for Payments" clause which reiterated *at least six times* that the contractor was not to proceed with work unless and until it was notified in

advance, in writing, that the contracting officer had funds on hand to pay it, and that absent such express advance notification the government would have no liability under the contract to pay anything. 208 Ct. Cl. at 805-8.

The situation in *Leavell* could not be more different from the situation here (or in *ASNA*):

- Instead of specifically conditioning work in future years on advance funding notification from the contracting officer, the contracts here contain no clause conditioning work on advance notice of anything.
- Instead of a multi-year contract payable over a period of years from future appropriations, each funding agreement here is a single-year contract payable from the current year's enacted appropriation.
- Instead of a contract that had no statute dictating its amount (indeed, no total payment amount was specified anywhere in the contract), 25 U.S.C. § 450j-1(g) commands that “[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)(1) and (2)].”
- Instead of receiving clear advance notice that each year's work was to be limited to the precise lower amount stated in the contracting officer's notification, here the contractors had no advance notice they would not be fully paid, and only learned *after performance* that they would be paid less than the full contract amount. Aplt's. Brf. 15-17.

All “availability” clauses are not alike, and the Federal Circuit in *ASNA* ignored these critical distinctions. Unlike the *Leavell* clause, the clauses in ISDA do *not* inform the contractor that the government will only be obligated to pay some lesser amount than the “full amount” required to be added to its contract (much less

inform it how much less it will be paid). The *Cherokee* Court, 543 U.S. at 637-38, 640, already so held.

Nowhere does the ASNA court explain why such radically different clauses and schemes—*Leavell*'s compared with ISDA's—should be construed to have essentially the same meaning and effect. Much more explicit risk-shifting language akin to *Leavell*'s is needed before *Ferris* can be overcome. Not only does ISDA provide *less* advance notice of a contract price reduction (actually, no notice at all), but in § 450j-1(g) the Act *requires* that all contract support costs “shall [be added] to the contract in the full amount to which the contractor is entitled under [subsec. (a)].” The command could not be more explicit, and no such commands appear in the *Leavell* contract.²

Much the same is true of *Winston*, involving a multi-year contract. When the funds on hand with the contracting officer for FY 1948 (the second year) proved less than had been originally “estimated,” the contracting officer made an “allocation” among the contractors, but, again, *before any work that year began*. 131 Ct. Cl. at 249-51. As in *Leavell*, the contracts had a comprehensive “*Failure of Congress to appropriate funds*” clause that expressly made the contracts contingent in later years “upon Congress making the necessary appropriation for expenditures thereunder,” and included a “release [of] the Government from all

² This requirement is repeated in the second sentence of § 450l(c), sec.1(b)(4), another statutory provision omitted from the ASNA opinion.

liability due to the failure of Congress to make such appropriation.” *Id.* at 247. Because the contractor thus had no firm contract rights for these future years, the court ruled that the contracting officer’s allocation among the contracts *prior to the commencement of performance* was valid so long as it was done “on a rational and non-discriminatory basis.” *Id.* at 254. And, like *Leavell*, the *Winston* contractors nonetheless succeeded in recovering their additional damages beyond the contract limits (there, through the reference process, *see* Priv. L. No. 84-623, 70 Stat. A52 (1956)) arising out of the work they *did* do.

In sum, *Leavell* and *Winston* expressly *limit* liability when appropriations fall short by reducing the contract price. The ISDA does the opposite: it expressly *commands inclusion* in each annual funding agreement of full contract support costs.

III. THE ASNA COURT MISAPPLIED *FERRIS*.

The law recognizes that the very functioning of the Federal Government depends on stable and equitable contracting rules and on their uniform enforcement. The *Ferris* Rule of “legal availability”—a foundational rule in government contract law—originated in two cases usually cited together. *Dougherty v. United States*, 18 Ct. Cl. 496 (1883); and *Ferris*, 27 Ct. Cl. 542

(1892). A myriad of related contract principles surrounds these rulings.³ *ASNA* conspicuously departs from this otherwise unbroken line, exclusively with respect to ISDA cases where (ironically) the United States owes a special trust duty to tribal contractors. 25 U.S.C. §§ 450a, 450n.

The *ASNA* court asserts that “[i]n *Ferris* the appropriations act did not contain a statutory cap with respect to the project in question . . .” *ASNA*, slip op. at 13 (citing *Ferris*, 27 Ct. Cl. at 546). But that is certainly a false distinction, for the same was true in *ASNA* and is true here. In *Ferris* there was a capped

³ See, e.g., *Murray v. Charleston*, 96 U.S. 432, 445 (1877) (government’s “promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity”); *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) (contract liabilities may be created where there is no appropriation of money to pay the obligations); *Gibney v. United States*, 114 Ct. Cl. 38, 50-53 (1949) (same); *New York Airways v. United States*, 177 Ct. Cl. 800, 805 n.1, 808-9 (1966) (contractor has right to full payment where authorizing statute, as here, creates a contract “entitle[ment]” even where a capped appropriation is knowingly smaller than the amount required to compensate all contracts authorized by the statute, as here) (cited twice in *Cherokee*, 543 U.S. at 642, 643); *Padbloc Co. v. United States*, 161 Ct. Cl. 369, 376-77 (1963) (“We are not to suppose that one party was to be placed at the mercy of the other” “[so as to give] the United States carte blanche.”) (citations omitted); *S.A. Healy Co. v. United States*, 216 Ct. Cl. 172 (1978) (see discussion *infra* at 11-13); *Neal & Co. v. United States*, 19 Ct. Cl. 463, 471-73 (1990) (where federal contract provision is susceptible to more than one reasonable interpretation, ambiguity must be resolved in favor of the contractors); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570-71 (1997) (government obliged to compensate fully contractor that had performed contract despite unavailability of appropriations); *AT&T Co. v. United States*, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (contractor entitled to be paid even though it proceeded with construction of a major defense system exceeding express statutory limits because “[a]n invalidation of a contract after it has been performed is not favored.”).

appropriation to the agency—readily apparent from the face of the appropriations act—of \$45,000 “for improving Delaware River” (Act of March 3, 1879, 20 Stat. 363, 364 (1879)), but there was no cap on “the project in question” (in *Ferris*, the Mifflin dredging project). So too, here, the appropriations acts capped the agency’s contract support appropriation to over \$100 million (and over \$200 million in *ASNA*), but there was no statutory cap “with respect to the project in question”—whether the IHS hospital contracted in *ASNA* or the particular BIA projects covered by Ramah’s, Oglala’s and Zuni’s contracts. Thus, the situations presented in *Ferris*, *ASNA* and here are materially *identical*, and the fact that all of these appropriations were capped at some level changes nothing. And this is the important point: every general “lump sum” appropriation is capped by the limits of the act itself. A “not to exceed” sub-appropriation merely acts as a junior appropriation for a specific purpose, but it functions like a “lump sum” appropriation *with respect to multiple contractors to be paid from it*. That is because it, too, meets the three-part purpose-time-amount test noted in GAO Redbook 4-6 (2004). *See* Aplt’s Brf. 24-25. That is the heart of the *Ferris* Rule.⁴

⁴ And just as “reallocation” from other contractors to *Ferris* was not the basis for the *outcome* in *Ferris*, so, too, reallocation from other tribal contractors to *ASNA* or to Ramah, Oglala or Zuni is not the basis for recovery here (which is why the *ASNA* court’s discussion of reallocation issues, slip op. at 13-14, is particularly difficult to comprehend). The premise of a recovery under the *Ferris* Rule is not that funds should have been taken from another contractor to pay the plaintiff. Instead, it is that funds which were legally available to pay the plaintiff

The “not to exceed” \$200,000,000 cap in *ASNA* and each \$100,000,000 cap here limits the amounts appropriated to pay all the agencies’ contracts. But, just like the \$45,000 capped appropriation for multiple contractors and projects in *Ferris*, the capped CSC appropriations for multiple contractors and projects here provide no notice that the government will not be liable for the full contract price mandated by ISDA § 450j-1(g) if appropriations are insufficient to pay all contractors and their projects.

In sum, just as the outcome in *Ferris* meant that the government both exhausted the appropriation and yet had to pay damages for breach of contract to *Ferris*, so too in *ASNA* and here, the correct result is an award of damages arising out of a breach of contract for any underpayment to any one contractor carrying out a contracted ISDA “project.” *Cherokee*, 543 U.S. at 643 (citing the Judgment Fund, 31 U.S.C. § 1304). Such an award is not an improper augmentation of a capped appropriation, any more than was the damage award in *Ferris* (or even in *Leavell*). The policy behind the *Ferris* Rule applies equally here—reliance, stability and certainty of payment for services performed.

went elsewhere, and the plaintiff does not bear the risk of that occurrence and that the funds would be insufficient to pay everyone. This is not just a matter of the Supreme Court parroting a litigant’s position, *ASNA*, slip op. at 12-13 n.6, (characterizing the Court’s discussion at 543 U.S. at 637), but an actual holding of the Court. *Cherokee*, 543 U.S. at 640.

IV. THE ASNA COURT FAILED TO CONSIDER ISDA'S MANDATORY RULE OF STATUTORY CONSTRUCTION AND THE OVERALL STATUTORY SCHEME.

The ISDA's command in § 450j-1(g) to add to every contract the "full amount" of contract support costs "to which the contractor is entitled" is expressed repeatedly. *See* § 450j-1(a)(2), (3), (5); § 450j-1(b)(1); § 450j-1(d)(2); § 450l(c), sec.1(b)(4). By equating this scheme to *Leavell's* and to *Winston's*, the ASNA court reads out of ISDA perhaps its most important element—guaranteed full funding of contract support costs. *See* Aplt's. Brf. 20, 23-24, 38-39, 46-47; Reply Brf. 8-13, 24-25.

Even if these ISDA clauses were ambiguous, the ASNA court failed to heed—even to *mention*—Congress's directive that "[e]ach provision of the [ISDA] and each provision of this Contract *shall be liberally construed for the benefit of the Contractor,*" § 450l(c), sec.1(a)(2) (emphasis added), a rule having particular force here given the law of this case. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997). As this Court has held, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Id.* Indeed, the government has admitted that ISDA *can* be read precisely as the Tribes do here (Aplt's. Brf. 56-60; Reply Brf. 25-27), compelling the adoption of the Tribes' construction.

V. THE UNCONTESTED FACTS HERE SHOW CONCLUSIVELY THAT THE SECRETARY DID NOT ASK CONGRESS FOR SUFFICIENT FUNDS TO PAY 100% OF CONTRACT SUPPORT COSTS.

In keeping with the courts' emphasis on risk-shifting, an agency's failure to ask Congress for sufficient appropriations to pay its contract obligations vitiates even a *Leavell*-style "funds available" clause if the contract does not expressly shift to the contractor the risk that the agency will fail to request sufficient funds. *S.A. Healy*, 216 Ct. Cl. at 188; *San Carlos Irrigation & Drainage Dist. v. United States*, 23 Cl. Ct. 276, 282-83 (1991). No such risk-shifting language appears in ISDA contracts.

The *ASNA* court asserts that the record before it did not establish the necessary elements to invoke this principle. Slip Op. at 15-17. Whatever the facts in *ASNA*, those elements are indisputably present here:

1. The Secretary did not ask Congress for sufficient appropriations. Apls. Brf. 36; Reply Brf. 28-32;
2. Congress was not timely notified of any shortfalls as required by ISDA, 25 U.S.C. § 450j-1(c). Apls. Brf. 36 n. 21; Reply Brf. 28-30; and
3. Congress appropriated all that was requested or more. Appx. 383 (Figure 4.8).

The legislative history of Indian Health Service appropriations (slip op. at 6-7) also differs markedly from the history applicable to the capped contract support cost appropriations for the BIA at issue here. The BIA caps were initiated in FY

1994, shortly after *Lincoln v. Vigil*, 508 U.S. 182 (1993). The history shows that the caps were inserted, not to undermine the stability and adequacy of ISDA funding, but to protect other tribal programs which *Lincoln* ruled were otherwise not protected from funding reductions. Aplt's. Brf. 44-45. Satisfying that objective does not require reducing the obligation for paying full contract support costs to ISDA contractors. Congress was apologetic about the caps, asserting an intention to “repay” shortfalls and actually appropriating extra funds to make up for prior-year shortfalls. Aplt's. Brf. 12, 44-45, 52-53. Cf. S. Rep. No. 103-374, at 9 (1994). This history contrasts with the history discussed in *ASNA* for the IHS caps, although we do not agree that the outcome in *ASNA* was correct simply because that history may be different.

VI. THE GOVERNMENT’S ARGUMENT REDUCES TO A SINGLE UNTENABLE POINT—THAT IT HAS UNFETTERED DISCRETION OVER HOW MUCH IT PAYS FOR CONTRACT SUPPORT COSTS AFTER PERFORMANCE.

The *ASNA* court disregarded Congress’s intent to leave the Secretary with as little discretion as possible in ISDA contract funding allocation matters. 25 U.S.C. §§ 450j-1(b)(1), (2), (3), (4) & 450k(a)(1); *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (Congress’s purpose in § 450m-1(a) was to counter the “argu[ment] that such contractors have *no legal remedies at all* by which to redress the Bureau’s failure to fund their contracts with indirect costs *at the level mandated by law and by their contract terms*”) (quoting S. Rep. No. 100-

274, at 37 (1987)) (emphasis added). That is why Congress provided a remedy for nonpayment of contract support costs and other required funding components in ISDA's 1988 amendments, including the Contract Disputes Act remedy of damages. S. Rep. No. 100-274, at 34 (1987) (1988 amendments added CDA remedies to overturn ruling in *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985), that such remedies were not available for ISDA contracts).

The *ASNA* court simply cast all this aside, together with the Supreme Court's admonition that ISDA's "availability" clause is not "an affirmative *grant* of authority to the Secretary to adjust funding levels based on appropriations." *Cherokee*, 543 U.S. at 643-44 (rejecting government position).

At oral argument, counsel for the government vigorously asserted that the Secretary may avoid liability simply by not asking Congress for any appropriation for contract support, thus exposing the basic flaw in the government's reading both of ISDA and of fundamental contract law. In 1997 the Federal Circuit in *New Valley Corp. v. United States*, rejected a similar argument: "A party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void." 119 F.3d 1576, 1584 (Fed. Cir. 1997) (citations omitted). The government's argument has no place in federal contract law, especially when the contracts are with Indian Tribes.

CONCLUSION

For the foregoing reasons, Appellants respectfully suggest that the Court should not follow the Federal Circuit's opinion in *ASNA*.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements**

1. This brief complies with the Court's December 22, 2010 order limiting the supplemental brief to 15 pages or less (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2007 in a proportionally spaced Times New Roman typeface in a 14-point font.

/s/ Daniel H. MacMeekin

Dated: January 25, 2011

CERTIFICATION OF DIGITAL SUBMISSION

All required privacy redactions were made. A virus check was performed on the electronic document, using AVG Anti-Virus (version 10.0.1202, last updated January 25, 2011), and no virus was detected.

/s/ Daniel H. MacMeekin

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2011, I caused a copy of the foregoing to be filed electronically with the Court using the Court's CM/ECF system. Service will automatically be made on the following counsel through the CM/ECF system:

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