

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

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

Plaintiffs,

vs.

No. CIV 90-0957 LH/KBM ACE

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

Defendants.

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

**MICHAEL P. GROSS**  
Class Counsel  
M. P. Gross & Associates, P.C.  
460 St. Michael's Drive, #401  
Santa Fe, New Mexico 87505  
Telephone (505) 995-8066  
Fax (505) 989-1096

**C. BRYANT ROGERS**  
Co-Class Counsel  
Roth, Van Amberg, Rogers,  
Ortiz & Yepa. LLP  
P. O. Box 1447  
Santa Fe, NM 87504-1447  
Telephone (505) 988-8979  
Fax (505) 983-7508

**LLOYD B. MILLER**  
Co-Class Counsel for the Direct CSC Claim  
Sonosky Chambers Sachse  
Miller and Munson  
900 W Fifth Street, Suite 700  
Anchorage, Alaska 99501  
Telephone (907) 258-6377  
Fax (907) 272-8332

**ERIC TREISMAN, ON BRIEF**  
460 St. Michael's Drive, Suite 402  
Santa Fe, New Mexico 87505  
Telephone (505) 986-9750  
Fax (505) 986-8305

July 20, 2005

## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF AUTHORITIES .....   | ii |
| INTRODUCTION .....   | 1  |
| OVERVIEW OF REMAINING ISSUES .....   | 1  |
| ARGUMENT .....   | 4  |
| I.    “NOT TO EXCEED” LANGUAGE, NEITHER IN AND<br>OF ITSELF NOR IN COMBINATION WITH SECTION 314,<br>TRANSFORMS “FERRIS”-TYPE APPROPRIATIONS TO<br>“SUTTON”-TYPE APPROPRIATIONS .....   | 4  |
| II.   ISDA CONTRACTS LIMIT THE SECRETARY’S<br>EXPENDITURE AUTHORITY AS TO CSC, NOT<br>HER CONTRACT AUTHORITY .....   | 10 |
| A.   ISDA Expressly Confers Contract Authority<br>As to CSC on the Secretary; Contract Authority<br>Is Distinct From Expenditure Authority .....   | 10 |
| B. <i>Cherokee</i> Deflates the Federal Circuit Decision in<br><i>Oglala</i> and the Ninth Circuit Decision in <i>Shoshone-<br/>              Bannock</i> Particularly as to Contract Authority .....  | 14 |
| C.   Congress Retains Power of the Purse .....   | 18 |
| III.  WHERE AN AGENCY FAILS TO REQUEST ADEQUATE<br>APPROPRIATIONS, A “FUNDS AVAILABLE” CLAUSE THAT<br>DOES NOT UNAMBIGUOUSLY IMPOSE THE RISK OF AN<br>INADEQUATE REQUEST FOR APPROPRIATIONS ON THE<br>CONTRACTOR DOES NOT RELIEVE THE GOVERNMENT<br>OF LIABILITY ..... | 19 |
| IV. <i>CHEROKEE</i> HARMONIZES ISDA WITH ORDINARY FEDERAL<br>CONTRACT LAW .....  | 20 |
| CONCLUSION .....   | 23 |

**TABLE OF AUTHORITIES**

**Cases:**

*In Re Alamo Navajo School Board, Inc. and Miccosukee Corp.*,  
98-2 B.C.A., ¶ 29,831 and ¶ 29,832, 1997 WL 759441 ..... 12, 14

*American Tel & Tel Co. v. United States*,  
177 F.3d 1368 (Fed. Cir. 1999) ..... 14

*Babbitt v. Oglala Sioux Tribe*,  
194 F.3d 1374 (Fed. Cir. 1999) ..... 14

*Blackhawk Heating & Plumbing Co. v. United States*,  
622 F.2d 539 (Ct. Cl. 1980) ..... 4

*Bryan v. Itasca County*,  
426 U.S. 373 (1976) ..... 13

*Cherokee v. Thompson*, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002),  
*rev'd sub nom Cherokee v. Leavitt*, 125 S. Ct. 1172 (March 1, 2005) ..... *passim*

*Collins Case*,  
115 Ct. Cl. 35 (1879) ..... 11

*Crownpoint Inst. of Technology v. Norton, et al.*,  
D.N.M. CIV 04-531 JP/DJS ..... 16, 17

*Dougherty v. United States*,  
18 Ct. Cl. 496 (1883) ..... 4

*Ferris v. United States*,  
27 Ct. Cl. 542 (1892) ..... 4

*Franconia Associates v. United States*,  
536 U.S. 129 (2002) ..... 12, 18

*In Re St. Regis Mohawk Tribe*,  
Dept. of Health and Human Services,  
Departmental Appeal Board (DAB),  
No. A-02-12, Decision No. 1808 (Jan. 17, 2002) ..... 17

*Lincoln v. Vigil*,  
508 U.S. 182 (1993) ..... 7

|   |                    |
|---|--------------------|
| <i>N.Y. Central RR. Co. v. United States</i> ,<br>21 Ct. Cl. 468 (1886) .....   | 6                  |
| <i>New Valley Corp. v. United States</i> ,<br>119 F.3d 1576 (Fed. Cir. 1997) .....  | 12                 |
| <i>New York Airways, Inc. v. United States</i> ,<br>369 F.2d 743 (Ct. Cl. 1966) .....   | 11, 12, 15, 16, 20 |
| <i>P. J. Dick, Inc. v. Principi</i> ,<br>324 F.2d 1364 (Fed. Cir. 2003) .....   | 8                  |
| <i>Precision Pine and Timber, Inc. v. United States</i> ,<br>50 Fed. Cl. 35 (Fed. Cl. 2001) .....   | 12                 |
| <i>Ramah Navajo Chapter v. Lujan</i> ,<br>112 F.3d 1455 (10 <sup>th</sup> Cir. 1997) .....  | 13                 |
| <i>Ramah Navajo School Board, Inc. v. Babbitt</i> ,<br>87 F.3d 1338 (D.C. Cir. 1996) .....  | 21, 23             |
| <i>Republic Airlines, Inc. v. United States</i> ,<br>849 F. 2d 1315 (10 <sup>th</sup> Cir. 1988) .....  | 16                 |
| <i>Ross Construction Co. v. United States</i><br>392 F. 2d 984 (Ct. Cl. 1968) .....   | 4                  |
| <i>S.A. Healy Co. v. United States</i> ,<br>576 F.2d 299 (Ct. Cl. 1978) .....   | 3, 19              |
| <i>San Carlos Irrigation and Drainage Dist. v. United States</i> ,<br>23 Cl. Ct. 276 (1991) .....   | 19                 |
| <i>Short Bros., PLC. v. United States</i> ,<br>2005 WL 1395028 (Fed. Cl. June 10, 2005) .....   | 8                  |
| <i>Shoshone Bannock v. Shalala</i> ,<br>279 F.3d 660 (9 <sup>th</sup> Cir 2002) .....   | 14                 |
| <i>Sutton v. United States</i> ,<br>256 U.S. 575 (1921) .....   | 5, 7               |
| <i>Thompson v. Cherokee Nation of Oklahoma</i> ,<br>334 F.3d 1075 (Fed. Cir. 2003), <i>aff'd</i> , <i>Cherokee Nation, et al.</i><br><i>v. Leavitt, et al.</i> , 125 S. Ct. 1172 (2005) ..... | 8                  |

|  |               |
|--|---------------|
| <i>United States v. Winstar</i> ,<br>518 U.S. 839 (1996) .....           | 8, 10, 12, 18 |
| <i>Wetsell-Oviatt v. United States</i> ,<br>38 Fed. Cl. 563 (1997) ..... | 11, 17        |

**Statutes:**

|   |                |
|---|----------------|
| <b>Anti-Deficiency Act,</b><br>31 U.S.C. §§ 1341 <i>et seq.</i> .....                                   | 13, 14, 15, 17 |
| 31 U.S.C. § 1341(a)(1)(A) .....   | 13             |
| 31 U.S.C. § 1341(a)(1)(B) .....   | 13             |
| <b>Budget Act,</b><br>2 U.S.C. § 622(2)(A)(iii) and § 622(9) .....                                      | 11             |
| <b>Contract Disputes Act,</b><br>41U.S.C. § 601 <i>et seq.</i> .....                                    | 15             |
| 41 U.S.C. § 612a .....  | 14             |
| <b>Indian Health Care Improvement Act,</b><br>25 U.S.C. §1658 .....                                     | 14             |
| <b>Indian Self-Determination and Education Assistance Act,</b><br>25 U.S.C. §§ 450 <i>et seq.</i> ..... | <i>passim</i>  |
| 25 U.S.C. § 450f(a)(1) .....  | 10             |
| 25 U.S.C. § 450j(c)(1)(B) .....   | 17             |
| 25 U.S.C. § 450j(d) .....   | 17             |
| 25 U.S.C. § 450j-1(a) .....   | 9, 21, 22      |
| 25 U.S.C. §450j-1(b) .....  | 10, 17, 21     |
| 25 U.S.C. § 450j-1(d)(2) .....  | 21             |
| 25 U.S.C. §450j-1(g) .....  | 9, 10, 17, 21  |
| 25 U.S.C. §450l (c) .....   | 10, 11, 22     |

|  |               |
|--|---------------|
| 25 U.S.C. §450 <i>l(c)</i> Model Contract § 1(a)(1) .....  | 10            |
| 25 U.S.C. §450 <i>l(c)</i> Model Contract § 1(a)(2) .....  | 13            |
| 25 U.S.C. §450 <i>l(c)</i> Model Contract § 1(b)(4) .....  | 11, 12, 21    |
| 25 U.S.C. §450m-1(a) .....   | 22            |
| 25 U.S.C. §450m-1(d) .....   | 22            |
| 25 U.S.C. § 2008(g)(2) .....   | 14            |
| Judgment Fund,   |               |
| 31 U.S.C. § 1304 .....   | 15, 16        |
| Public Law 105-18, 111 Stat. 158 (1997) .....  | 7             |
| Public Law 103-327, Tit. III, 108 Stat. 2298 (1994) .....  | 7             |
| Public Law 103-317, Tit. II, 108 Stat. 1724 (1994) .....   | 7             |
| Public Law 103-316, Tit. I, 108 Stat. 1707 (1994) .....  | 7             |
| Budget Procedures  |               |
| 31 U.S.C. §§ 1101 <i>et seq</i> .....  | 11            |
| 31 U.S.C. § 1108 .....   | 20            |
| Section 314 of the 1999 Appropriations Act, 112 Stat. 2681-2688 .....  | 9, 10, 14, 22 |
| <br><b>Legislative Materials:</b>  |               |
| Senate Report 100-274 .....  | 19            |
| Senate Report 103-294 .....  | 19            |
| <br><b>Other Authorities:</b>  |               |
| Federal Rules of Civil Procedure 201 .....   | 17            |
| <i>In the Matter of the Army Corp of Engineers' Continuing Contracts,</i><br>1997 WL 10467 (Comp. Gen.), 56 Comp. Gen. 437 ..... | 18            |

|  |       |
|--|-------|
| Nash & Cibinic Comment on <i>Cherokee</i> Case (2005) .....  | 8, 13 |
| Office of Management and Budget Circular A-11 (2002) .....   | 8     |
| Office of Management and Budget Circular A-34 (2000)<br>INSTRUCTIONS ON BUDGET EXECUTION .....   | 8     |
| United States General Accounting Office, REDBOOK ON APPROPRIATIONS<br>LAW, 2 General Accounting Office, PRINCIPLES OF FEDERAL<br>APPROPRIATIONS LAW (2d ed 1992) ..... | 15    |
| United States General Accounting Office, PRINCIPLES OF FEDERAL<br>APPROPRIATIONS LAW, 2d Ed., Vol. II .....  | 7     |
| United States General Accounting Office, PRINCIPLES OF FEDERAL<br>APPROPRIATIONS LAW (3d. Ed. 2004) .....  | 8     |

## INTRODUCTION

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

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

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

## OVERVIEW OF REMAINING ISSUES

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

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

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

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

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

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

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

---

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

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

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

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

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

## ARGUMENT

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

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

[A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of “insufficient appropriations,” even if the contract uses language such as “subject to the availability of appropriations,” and **even if the agency’s total lump-sum appropriation is insufficient to pay all the contracts the agency has made.** ... “A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.” (emphasis added)

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

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

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

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

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

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

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

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

ONGOING/EXISTING CONTRACTS/ANNUAL FUNDING AGREEMENTS. . . . Each area office will submit a CSF Needs Report to the Central Office for ongoing contracts annual funding agreements by July 15, 1999. CSC will be provided to each area office based on these reports. *If* these reports indicate that \$114,871,000 will not be sufficient to cover the entire need, this amount will be distributed pro rata, so that all contractors and compactors receive the same percentage of this reported need . . .

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

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

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

---

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

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

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

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

125 S. Ct. at 1179.

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

---

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

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

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

---

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

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

the same position. As to both it is incapable of knowing whether the appropriation will be enough to cover its needs, and if not, what size gap will occur between the amount due under the contract and the amount that will be paid by the Secretary.

The wording of the contracts was not changed when the appropriation caps were introduced. The contract price term, §§ 450j-1(g) and 450j-1(a), did not change. All that changed was that a lump-sum appropriation for contract support costs was carved out that turned out to be insufficient to allow the Secretary to liquidate every contract's debt for contract support costs. But in substance this was no different from the situation in pre-cap, lump-sum years. In those years, as now, the agency ran out of money (or so it was argued). Yet the price term was enforceable. As the *Cherokee* Court noted at 1178-1179: "The Act also reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." (emphasis added) *Cherokee's* repeated conclusion that ISDA contracts are enforceable contracts, "even if the agency's total lump-sum appropriation is insufficient to pay **all** the contracts the agency has made" (124 S. Ct. at 1177), applies equally to contracts in cap years where there was a capped lump-sum CSC appropriation.

Just as the Court's rejection of the Government's argument regarding Section 314 left the contract obligation intact, caps leave the contract obligation for CSC intact. Both Section 314 and the caps restrict the sources of *agency* funding which may be used to liquidate the contract debt. But in both cases the contract price remains a liability of the Government.<sup>5</sup>

---

<sup>5</sup> *Cherokee* at 1182 expressly rejects section 314 as a restriction on the Government's liability and disposes of the Government's interpretation that it was intended to clarify ambiguity in earlier appropriation Acts: "The earlier appropriations statutes, however, were not

## II. ISDA CONTRACTS LIMIT THE SECRETARY'S EXPENDITURE AUTHORITY AS TO CSC, NOT HER CONTRACT AUTHORITY.

### A. ISDA Expressly Confers Contract Authority as to CSC on the Secretary; Contract Authority is Distinct From Expenditure Authority.

The Secretary is given authority to enter ISDA contracts on behalf of the United States of America, 25 U.S.C. § 450j-1(g)<sup>6</sup>; § 450 l(c), Model Agreement § 1(a)(1); and see, 25 U.S.C. § 450f(a)(1). The Secretary is also the paymaster who normally makes all expenditures on ISDA contracts. But her contract authority to bind the United States by executing ISDA contracts, and her expenditure authority to fulfill ISDA contract obligations, are not one and the same. Once Congress makes an appropriation for the Secretarial program amount, the statute commands the addition of full CSC. 25 U.S.C. § 450j-1(g). This is contract authority. Only the Secretary's role as paymaster is limited by the model provision at § 1(b)(4) which implements the § 450j-1(b) proviso.

---

ambiguous.” Citing *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Supreme Court rejected the Government's interpretation that 314 bars payment of the full contract prices in the previous years covered by that rider: “[That] interpretation would undo a binding governmental contractual promise. A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution.” It noted efforts around the time 314 was first enacted by the IHS to use prior year surpluses to pay down unreimbursed contract support costs from prior years and concluded that 314 was intended merely to prevent that use, presumably in favor of expending those left over monies for other purposes, just as Plaintiffs said in Docket No. 601 at 11. Likewise, the caps prevent the remainder of the appropriation from being used to pay down the CSC obligation, also protecting other activities including programs of non-contracting tribes. Non-contracting tribes have no legal recourse (*see Lincoln v. Vigil*), but contractors do. Caps protect all Indian tribes in tight money years because, unlike non-contractors, Plaintiffs “are free to pursue appropriate legal remedies arising because the Government broke its contractual promise.” *Cherokee* at 1180.

<sup>6</sup> 25 USC § 450j-1(g): “Upon 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 subsection (a) of this section . . .”

The distinction between contract authority and expenditure authority is well recognized, beginning with the statutory definitions in the Budget Act, 2 U.S.C. § 622(2)(A)(iii):

The term ‘budget authority’ means the Authority provided by Federal Law to incur financial obligations , as follows: ... (iii) **contract authority**, which means the making of funds available for **obligation**, but not for **expenditure**... . (emphasis added)

*And see*, 2 U.S.C. § 622(9); 31 U.S.C. § 1101 *et seq.* Many cases, including *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), cited in *Cherokee* at 125 S. Ct. 1180, turn on the distinction. Plaintiffs have cited more than a dozen from *Collins Case*, 115 Ct. Cl. 35 (1879) through *Wetsell-Oviatt v. United States*, 38 Fed. Cl. 563 (1997). *See* Docket No. 203, pp. 19-21; Docket No. 571, pp. 31-37; Docket No. 583, pp. 31-36; and Docket No. 601, p. 2.

The plain words of the funds available clause at § 1(b)(4) of the Model Contract 25 U.S.C. § 450I(c)<sup>7</sup>, at issue here, speak to the Secretary’s expenditure authority:

- (4) Funding amount. Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection f(2). Such amount shall not be less than the applicable amount determined subject to section 106(a) of the Indian Self Determination and Education Assistance Act.<sup>8</sup>

Defendants’ basic argument throughout this long case has been that “subject to availability of appropriations” modifies “amount,” thus preventing formation of a contract in

---

<sup>7</sup> This mandatory contract clause implements and clarifies the earlier proviso set out in § 450j-1(b). The proviso was added in 1988: “Notwithstanding any other provision in this subchapter the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.”

<sup>8</sup> This clause appears in the Ramah Navajo Chapter’s contract, Attachment O, and Oglala Sioux Tribe’s contract, Attachment N to Docket No. 571.

excess of CSC appropriations. But this two-sentence contract clause does not support Defendants' interpretation. A fair reading of the first sentence in § 1(b)(4) makes "subject to the availability of appropriations" an adverbial phrase modifying "the Secretary shall make available." Not only is such a reading more grammatical, it dovetails with the adjectival phrasing in the next sentence, while Defendants' strabismic reading creates a tension. Meanwhile, the word "amount" in both sentences plainly refers to the contract price.

Effectively, Defendants detach "subject to the availability of appropriations" from the front of the first sentence of § 1(b)(4) and attach it to the back of the second sentence. But that is not how the contract is written. Tellingly, neither Defendants' Cross Motion and Opposition, Docket No. 594, nor Defendants Reply, Docket No. 605, ever actually reproduces the whole clause.

There is no real ambiguity here. Like the strikingly parallel exculpatory clause in *New York Airways, Inc. v. United States*, 369 F.2d 743, 745 (Ct. Cl. 1966), the ISDA model contract exculpatory clause goes to expenditure authority. *See Alamo/Miccosukee*, Sl. Op. 43, Attachment H to Docket No. 397.

Even if there were an ambiguity, indeed even if Defendants' interpretation were otherwise reasonable, the issue must still be resolved for the Plaintiffs, for several reasons:

1. In a contract drafted and mandated by the United States, an exculpation is construed narrowly and favorably to the contractor; *see, Precision Pine and Timber, Inc. v. United States*, 50 Fed. Cl. 35 (Fed. Cl. 2001); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997); *Winstar; Franconia Associates v. United States*, 536 U.S. 129 (2002);

2. 25 U.S.C. § 4501 (c), § 1(a)(2) of the Model Agreement provides that each provision of the contract and the Act shall be “liberally construed” for the benefit of the contractor; and

3. Ambiguities in statutes enacted for the benefit of Indians must be read favorably to the Indians. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10<sup>th</sup> Cir. 1997).

Under the ordinary rules of construction applied to federal procurement contracts, the exculpatory “availability of appropriations” clause in the model ISDA contract cannot be read other than to impose a limitation on the Secretary’s expenditure authority and not her contract authority. Furthermore, such a reading, adopted by the Interior Board of Contract Appeals in *Alamo/Miccosukee* and by other tribunals, is the only way to harmonize the ISDA. See Docket No. 397, pp. 26-29; Docket No. 571, pp. 39-50; Docket No. 583, pp. 30-35; and Docket No. 601, 3pp. 8-10. And see, Nash and Cibinic, Exhibit 3:

It appears that [contract authority] is the type of authority involved in these tribal contracts. In procurement contracts, it has been held that where obligations have been incurred under such ‘contract authority’, the Government is bound to those promises even though a subsequent appropriation is insufficient to cover the authorized obligations. . .”

*Cherokee* alludes to contract authority at 125 S. Ct. 1181, citing the Anti-Deficiency Act, 31 U.S.C. §§ 1341(a)(1)(A) and (B), noting that a contracting officer cannot bind the United States in advance of appropriations without special authority. *Cherokee* does not reach whether such special authority is conferred by ISDA “since Congress appropriated adequate unrestricted funds here . . .” *Id.* But *Cherokee*’s reasoning concerning the nature of the contractual obligation of an ISDA contract carries over.

Had Congress not meant to create special contract authority with regard to contract support costs, it could easily have said so, as it did in 25 U.S.C. §1658 and § 2008(g)(2) and in the 49 other statutes listed in Attachment I, Docket No. 571.

**B. Cherokee Deflates the Federal Circuit Decision in *Oglala* and the Ninth Circuit Decision in *Shoshone-Bannock*, Particularly as to Contract Authority.**

By explicitly reversing *Cherokee v. Thompson*, 311 F.3d 1054 (10<sup>th</sup> Cir. 2002), *Cherokee v. Leavitt* deflated its antecedents *Babbitt v. Oglala Sioux Tribe*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. den., sub. nom. Miccosukee Corp. v. Babbitt*, 530 US 1203 (2000); and *Shoshone Bannock v. Shalala*, 279 F.3d 660 (9<sup>th</sup> Cir 2002).

The Court reversed the entire judgment of the Tenth Circuit in *Cherokee v. Thompson* including the tangential holding that the appropriation for new and expanded contracts acted like a cap and came within the *Babbitt v. Oglala* rule. This necessarily touched *Shoshone-Bannock*, since that decision was identical to *Cherokee I* on this point.

*Cherokee* refers to the IBCA ruling in *Alamo/Miccosukee*, 125 S. Ct. at 1182, in its treatment of § 314 without mentioning that the decision was overturned on appeal to the Federal Circuit in *Babbitt v. Oglala*. The unusual omission of this subsequent history reinforces Plaintiff's point, at Docket No. 571, p. 55, that the 53 page IBCA decision (Attachment H, Docket No. 571) is better reasoned than Judge Plager's *Oglala* bootstrapping of his dissent in *American Tel & Tel Co. v. United States*, 177 F.3d 1368, 1379-81 (Fed. Cir.1999). Justice Breyer's remarks, addressing Government counsel in the *Cherokee* oral argument, provide context:

Is it, legally speaking, an appropriation available, not practically speaking but legally? And here it seems to me, in looking through

this somewhat quickly, that you say no, but the Board of Contract Appeals say yes. And so I think in my mind, you know, one group of people who really know about this is the Board of Contract Appeals. So if they're saying that money from a contract point – a point of normal contract law is legally available, I promise you I'm predisposed to think they're right.

Transcript of Proceedings, *Cherokee* Oral Argument of November 9, 2004, page 48, attached hereto as Exhibit 4 to this Memorandum.

*Cherokee*, 125 S. Ct. at 1180 points to several alternatives the agency may use when its appropriations prove inadequate to pay contract debts:

[T]he law normally expects the Government to avoid [running out of money to pay its contracts], for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise. (emphasis is original)

citing *New York Airways, Inc. v. United States*, 369 F.2d at 747-748; the Anti-Deficiency Act; the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, and the Judgment Fund, 31 U.S.C. § 1304, as well as the GAO REDBOOK ON APPROPRIATIONS LAW, 2 GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-17 to 6-19 (2d ed 1992).

The citation to *New York Airways* is particularly significant. That case involved a statute very similar to ISDA in that it specified that contracts for mail services were to be “paid out of appropriations”. The lawsuit arose because, as here, Congress cut appropriations but the contracted services had been performed. And it involved contracts whose contract price was determined by a pre-set rate, much like the indirect cost rate used by the BIA to determine ISDA contractors' CSC needs. The Court held for the contractor and against the Government. The

citation is doubly significant because *New York Airways* had been erroneously distinguished by the *Oglala* line, which refused to recognize the essential identity of the situations in *New York Airways* and the ISDA caps on CSC.

So long as Congress does not amend the model agreement to state clearly that insufficiency of appropriations limits the United States' *liability*, as in the 51 statutes at Exhibit I, Docket No. 571, mere inclusion in an Appropriation Act of a "not to exceed" amount does not alter the contract price nor the contract debt created by the Secretary's failure to pay the full contract price.

The fact that the contract debt may accumulate over several years because Congress has not fulfilled its implied duty to appropriate necessary funds to liquidate is of no legal relevance. Not appropriating money to pay its debts is a decision Congress can make. But the consequences of that decision are sealed in the contract remedy provisions of the Contract Disputes Act which incorporates the judgment fund.<sup>9</sup> See *Cherokee* at 1180; compare *Republic Airlines, Inc. v. United States*, 849 F. 2d 1315 (10<sup>th</sup> Cir. 1988) where Congress in an appropriations act expressly amended a statute to remove contract authority previously conferred, a situation not presented in *New York Airways* or here.

It is noteworthy that Judge Parker of this Court independently came to the same conclusion in a case still pending before him. *Crownpoint Inst. of Technology v. Norton, et al.*, D.N.M. CIV 04-531 JP/DJS. Ruling on a motion by plaintiff Navajo technical college for

---

<sup>9</sup> 41 U.S.C. § 612(a): "Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31."

sequestration of funds, Judge Parker denied the motion (Docket No. 17) on July 15, 2004, on grounds that the judgment fund would provide the source of payment if plaintiff prevailed. Copy attached as Exhibit 5 to this Memorandum. The Court is entitled to take judicial notice of the record in any case on the Court's docket. Plaintiff so requests. Fed. R. Civ. P. 201.

Casting further doubt on *Oglala*, an intervening decision of the Department of Health and Human Services Departmental Appeals Board (DAB) implicitly discards it. In *In Re St. Regis Mohawk Tribe*, Dept. of Health and Human Services, Departmental Appeal Board (DAB), No. A-02-12, Decision No. 1808 (Jan. 17, 2002) (Exhibit 6 to this Memorandum), a tribal contractor appealed from a partial declination denying immediate full advance funding under 25 U.S.C. § 450j(d) for the last quarter of the contractor's calendar year, a period falling outside the federal fiscal year appropriation covering the first three quarters. Seeking funds not yet appropriated, the contractor nevertheless prevailed. In reversing the declination, the DAB, whose decision was final for the Department, held that the IHS declination would "undermine the manifest legislative intent to provide the tribe the full measure of contract funding as expeditiously as possible". In reaching this decision the DAB brushed aside arguments based on §§ 450j-1(b), 450j(c)(1)(B), and the Anti-Deficiency Act. Citing *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570 (1997), the DAB ruled that "St. Regis has legitimately entered into a lawful contract with the IHS as authorized by statute." In other words, § 450j(d) confers contract authority. Because § 450j-1(g) is an even more express delegation of contract authority for contract support costs, the same finding applies here.

ISDA tribal contractors are fulfilling a major policy goal of the United States. They are carrying out programs and services for their own people which would otherwise be provided, less

effectively, by the BIA. In doing so, as our previous briefs have shown, contracting tribes are not supposed to sacrifice program levels. Preserving program levels is the central purpose of contract support costs. Attachment G, Sen. Rept. 100-274, at 12, 16, 30 (1988); Sen. Rept. 103-374, at 9 (1994).

### **C. Congress Retains Power of the Purse.**

Defendants' argument assumes that CSC caps are permanent, that Congress will never honor its contractual promises by appropriating enough money to pay CSC. They argue that treating CSC as a mandatory, proportional component of the ISDA contract price means permanent and indefinite claims on the Judgment Fund. They call Plaintiffs' position a slush fund approach.

But Defendants' interpretation rests on a false premise contrary to *Winstar*, 518 U.S. at 884-885, and n.29 (1996) and *Franconia*, 536 U.S. at 142, both of which are cited in *Cherokee* at 1181. Congress is expected to honor its contractual commitments and when it does not courts are empowered to render judgments.

What the Defendants are really saying is that they expect Congress to permanently and indefinitely dishonor its contractual commitments. But Congress has often authorized contracts in advance of appropriations and upon judicial confirmation of the obligation honored those commitments already made. *In the Matter of the Army Corps of Engineers' Continuing Contracts*, 1997 WL 10467 (Comp Gen.), 56 Comp. Gen. 437. Moreover, Congress has means to alter the nature of future contracts. But it need not do so in order to preserve its power of the purse.

Congress is well aware that CSC is a proportional component of contracted programs. It can easily adjust base program appropriations in keeping with overall budget limitations. By lowering the overall appropriations and not isolating CSC, Congress will automatically adjust the CSC appropriation downward without imposing the entire burden of CSC shortfalls on contractors with attendant reductions in their program levels. Under Defendants interpretation and practice, Indian communities served by ISDA contractors are forced to bear cuts in program services to cover CSC shortfalls, cuts not born by direct service communities, directly contrary to the express intent of Congress. Attachment G, Sen. Rept. 100-274 at 12, 16, 30; Sen. Rept. 103-294, at 9. A proper reading of the ISDA scheme results in the even distribution of program services across Indian country. The promise of ISDA is precisely that the exercise of self-determination prerogatives should not impair the level of program services. This promise can only be met by enforcing ISDA contractors' right to recover the full contract price for CSC.

**III. WHERE AN AGENCY FAILS TO REQUEST ADEQUATE APPROPRIATIONS, A "FUNDS AVAILABLE" CLAUSE THAT DOES NOT UNAMBIGUOUSLY IMPOSE THE RISK OF AN INADEQUATE REQUEST FOR APPROPRIATIONS ON THE CONTRACTOR DOES NOT RELIEVE THE GOVERNMENT OF LIABILITY.**

Plaintiffs, citing *S. A. Healy and San Carlos Irrigation and Drainage Dist. v. United States*, 23 Cl. Ct. 276 (1991), have briefed the rule of procurement contract law that even where a "subject to availability of appropriations" exculpatory clause clearly allocates all risk of loss to the contractor when Congress appropriates too little, the "protective umbrella" does not extend to an exhaustion of funds caused by the agency's own inadequate request, unless the clause clearly and unambiguously also places on the contractor the risk that the agency will not ask Congress

for sufficient funds. *See* Docket No. 571, 52-55; Docket No. 583, 21-22; and Docket No. 601, pp 3-6.

The Supreme Court in *Cherokee* at 1180 alludes to the “normal expect[ation]. . . [that] the Government [will] avoid such situations. . . by seeking additional funding from Congress. . .” citing *New York Airways*, 369 F.2d at 747-748. Countering with the Declaration of Harry Rainbolt to the effect that the BIA informed Congress of the need for CSC for each year and Congress made its own decision to fund less than the need, Defendants argue “Congress was well aware of the funding shortfalls from these reports.” Docket No. 594, p. 22. However, the key point shown by these annual budget requests – but omitted from the Rainbolt Declaration and the Defendants’ brief – is that in each of those years, the administration requested significantly less money for CSC than it knew was needed.

Each annual budget request (styled “budget justification”) submitted to Congress by the President has a statement of the need **and** a statement of the request. Attachment A, Ex. 3; and Ex. 7 to this Memorandum [reprints from pages in the President’s Budget Requests for the years 1995 through 2003]. A table showing need is not a “request for appropriation”. 31 USC § 1108. *And see* Exhibit 8 to this Memorandum, relevant portions of Deposition of James Thomas confirming that BIA did not request full funding.

#### **IV. CHEROKEE HARMONIZES ISDA WITH ORDINARY FEDERAL CONTRACT LAW.**

The central aim of federal contract interpretation and statutory construction is to carry out Congressional intent. The Supreme Court has reconfirmed that intent: “The Act also reflects a congressional concern with Government’s past failure adequately to reimburse tribes’ indirect administrative costs and *a congressional decision to require payment of those costs in the future.*”

125 S. Ct. at 1179. See, e.g., § 450j-1(g); see also §§ 450j-1(a), 450j-1(d)(2).” 125 S. Ct. at 1178-1179 (emphasis added).

This Court is therefore obliged to construe both the statute and the contract to carry out that intent, since there is no controlling language which prohibits that result. Here it is the Defendants’ construction that is strained. The Defendants’ reading nullifies §§ 450j-1(g) and 450j-1(d)(2).<sup>10</sup> It would allow a proviso to override a comprehensive amendment expressly intended to compel the payment of CSC, which the highest court in the land has just recognized was its purpose.

By contrast, Plaintiffs’ reading harmonizes and gives effect to every provision in the Act.:

1. In keeping with the purpose of the 1988 amendment, § 450j-1(g) requires inclusion of full CSC in each contract as part of the contract price, thereby creating a federal contract obligation and liability for any payment shortfalls;
2. The discrete and precise limitations on the Secretary’s ability to reduce a contract price contained in the body of § 450j-1(b) preceding the proviso are not rendered superfluous;
3. The proviso in § 450j-1(b), as clarified by the availability clause of the Model Agreement (§ 1(b)(4)), are given effect just as written – the agency (the Secretary) is not required to provide money to the contractor when it lacks sufficient appropriations to pay (“make available”) the amount required by the contract;

---

<sup>10</sup> “Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.” See *Ramah v. Lujan*, 112 F. 3d at 1461.

4. The right to sue for money damages created in § 450m-1(a) when the Secretary fails to pay the full contract price is retained and given effect through the Judgment Fund as incorporated in § 450m-1(d);

5. Section 314 only limits the source of payment by the Secretary for ISDA contracts, not the liability of the United States for breach; and

6. The various exculpatory clauses in ISDA and the Model Agreement, if ambiguous, are construed according to Plaintiffs' reasonable construction in keeping with the rule embodied in the Model Agreement requiring liberal construction in favor of the contractor.

The ordinary rules of federal contract construction applied to the ISDA contract compel Plaintiffs' reading. The contract clearly distinguishes between (1) the Secretary's duty to "make available to the Contractor the total amount [of CSC] specified," which is "subject to the availability of appropriations" and, (2) the United States' duty to make good on the full contract amount, which "shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1(a))." The dictate is plain: the contract shall be amended each year to add full CSC costs as determined by § 450j-1(a), but the Secretary "makes that amount available" by payments from Interior only when or to the extent that appropriations exist sufficient to pay it.

This is the only sensible construction for another reason as well. Under Defendants' interpretation, once a capped appropriation for contract support costs has been fully obligated or expended, the contractor has no remedy. Under Defendants' logic not even a contractor who later discovers that the BIA has made a mathematical error *or that the BIA has simply not paid*

*the acknowledged contract debt* could collect. This alone would wipe §§ 450m-1(a) and 1(d) off the books. Clearly such an outcome is completely contrary to Congress' stated intention.

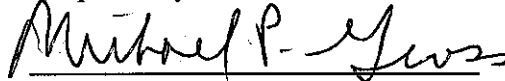
### CONCLUSION

For three decades, from the inception of ISDA contracting to the instant motion, the Interior Department, seeking to protect its turf, has fought, in court and out, for Secretarial discretion to ignore the binding nature of ISDA contracts. Courts including the 10<sup>th</sup> Circuit have called the agency to account, as in *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1344-1345 (D.C. Cir. 1996).

A wealth of federal contract precedent cited throughout our prior briefing supports Plaintiffs' contentions. Defendants have countered with non-contract cases and "common sense" that would render the ISDA contract price term illusory. In *Cherokee* the Supreme Court reminds us that Congress did not intend ISDA contracts to be illusory.

FOR THESE REASONS, Plaintiffs respectfully request that the Defendant United States be declared liable for shortfalls in payment of contracted amounts for contract support costs for the years 1994 forward; that the Court set a date for trial to determine the amount of damages to be paid; and that the Court provide such other and further relief as it deems necessary and appropriate.

Respectfully submitted:



MICHAEL P. GROSS

Class Counsel

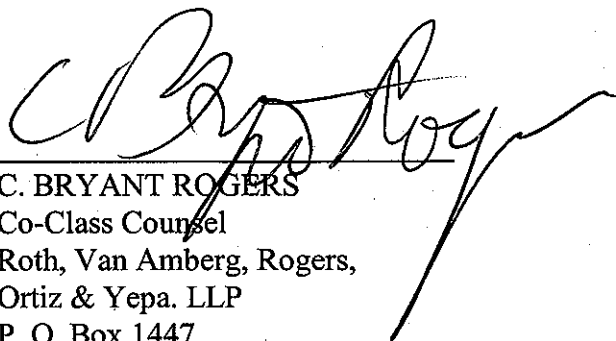
M. P. Gross & Associates, P.C.

460 St. Michael's Drive, #401

Santa Fe, New Mexico 87505

Telephone (505) 995-8066

Fax (505) 989-1096



C. BRYANT ROGERS  
Co-Class Counsel  
Roth, Van Amberg, Rogers,  
Ortiz & Yepa. LLP  
P. O. Box 1447  
Santa Fe, NM 87504-1447  
Telephone (505) 988-8979  
Fax (505) 983-7508



LLOYD B. MILLER  
Co-Class Counsel for the Direct CSC Claim  
Sonosky Chambers Sachse  
Miller and Munson  
900 W Fifth Street, Suite 700  
Anchorage, Alaska 99501  
Telephone (907) 258-6377  
Fax (907) 272-8332



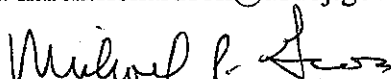
ERIC TREISMAN, ON BRIEF  
460 St. Michael's Drive, Suite 402  
Santa Fe, New Mexico 87505  
Telephone (505) 986-9750  
Fax (505) 986-8305

### CERTIFICATE OF SERVICE

The undersigned counsel of record for the Plaintiffs and Class hereby certifies that he caused a copy of the Supplemental Memorandum in Support of Plaintiffs' Amended Motion for Partial Summary Judgment to be sent by U.S. Mail, postage prepaid, and by electronic mail on this 20<sup>th</sup> day of July, 2005, to:

Jan Elizabeth Mitchell  
Assistant US Attorney  
Post Office Box 607  
Albuquerque, NM 87103  
Email: jan.mitchell@usdoh.gov

Karen K. Richardson  
US Department of Justice  
Civil Division, Room 6126  
20 Massachusetts Avenue, NW  
Washington, DC 20001  
Email: karen.richardson@usdoj.gov

  
Michael P. Gross