In the Supreme Court of the United States

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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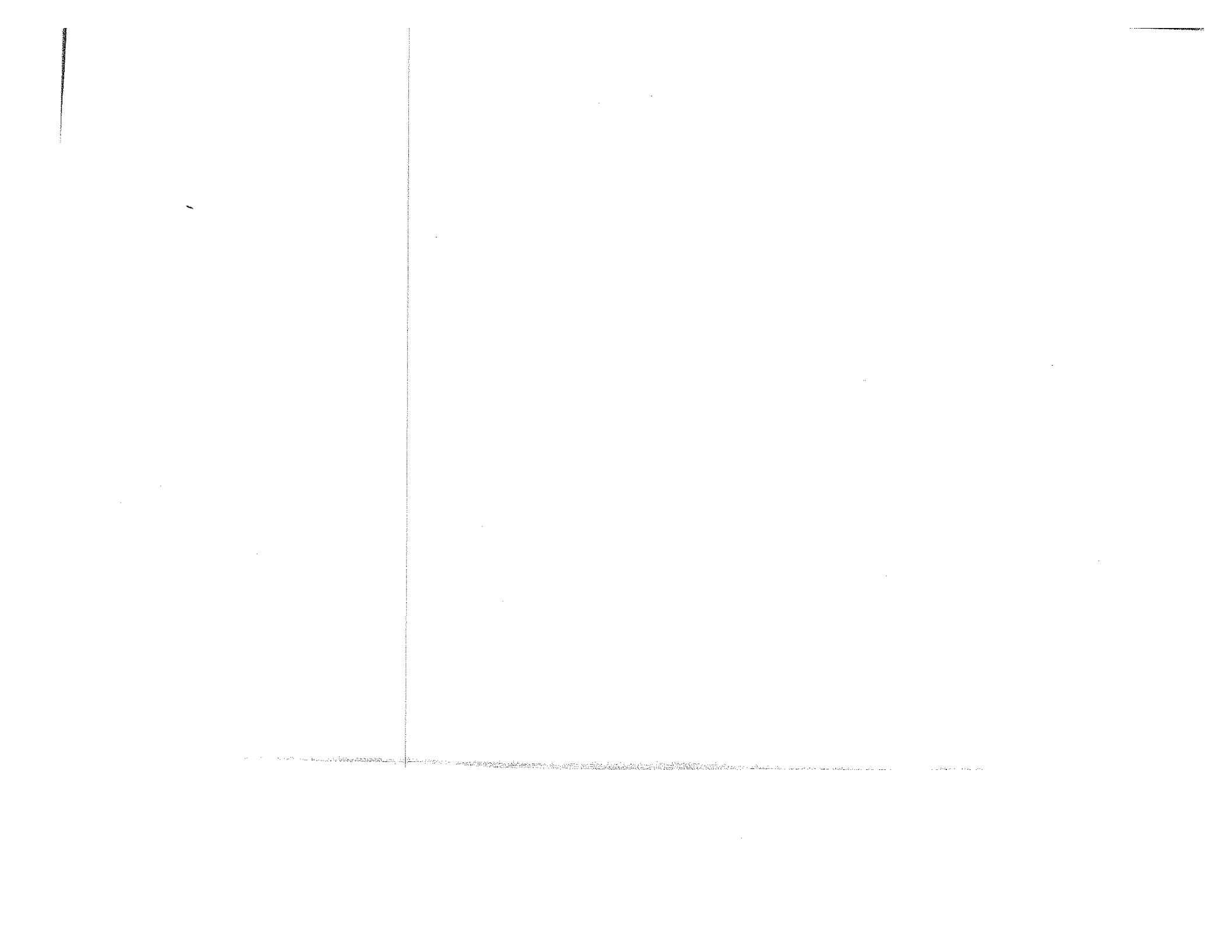
QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian Tribes for the administration of programs the Secretary otherwise would administer himself. The ISDA also provides that the Secretary shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether the ISDA requires the Secretary to pay contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were otherwise insufficient to fully fund those costs and would require reprogramming funds needed for non-contractable, inherently federal functions such as having an Indian Health Service.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars respondent from recovering its contract support costs.



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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 334 F.3d 1075. The relevant opinions of the Interior Board of Contract Appeals (App., *infra*, 43a-49a, 50a-73a) are not officially reported, but are available at 01-1 B.C.A. (CCH) ¶ 31,349, and 99-2 B.C.A. (CCH) ¶ 30,462.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2003. A petition for rehearing was denied on September 12, 2003 (App., *infra*, 36a-37a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 450j-1 of Title 25 of the United States Code and the applicable appropriations statutes are reproduced at App., *infra*, 81a-115a.

STATEMENT

This case raises issues concerning the funding of contracts with Indian Tribes that are the same as those presented in *Cherokee Nation* v. *Thompson*, 311 F.3d 1054 (10th Cir. 2002), petition for cert. pending, No. 02-1472 (filed Apr. 3, 2003) (*Cherokee I*). After the United States filed its brief in opposition in *Cherokee I*, the Federal Circuit issued its decision in this case, expressly disagreeing with the Tenth Circuit's decision in *Cherokee I*, as well as the Ninth Circuit's decision in *Shoshone-Bannock Tribes* v. *Secretary, Department of Health & Human Services*, 279 F.3d 660 (9th Cir. 2002). Following the Federal Circuit's denial of rehearing in this case, the United States filed a supplemental brief in this Court in *Cherokee I*, stating that it does not oppose the grant of certiorari in that case. See 02-1472 Gov't Supp. Br. 5 (Sept. 25, 2003). The government suggests that the petition in this case be granted along with *Cherokee I* and that the cases be consolidated for briefing and argument. In the alternative, the Court may wish to hold this petition pending disposition of *Cherokee I*.

1. **The Indian Self-Determination And Education Assistance Act.** The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, was enacted in 1975 to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs provided to the Tribes and their members. 25 U.S.C. 450a(b). At the request of a Tribe, the Secre-

tary of Health and Human Services (the Secretary) must enter into a "self-determination contract" with "a tribal organization," under which the tribal organization will "plan, conduct, and administer programs" previously administered by the Secretary for the benefit of the Indians. 25 U.S.C. 450f(a).[1] The Secretary has delegated his authority to enter into self-determination contracts to the Indian Health Service (IHS), the component of the Department of Health and Human Services responsible for providing primary health care for American Indians and Alaska Natives. 25 U.S.C. 13, 1601; 42 U.S.C. 2001. ISDA contracts are not government procurement contracts. They are government-to-government funding arrangements under which the Tribes are, in effect, substituted for a federal agency in the provision of governmental services and the receipt of federal funds. See 25 U.S.C. 450f(a)(1).

The ISDA divides funding of self-determination contracts into two primary components. First, the Secretary must provide funding of no less than the amount the Secretary otherwise would have expended if the relevant program were operated by IHS itself, 25 U.S.C. 450j-1(a)(1), a sum sometimes referred to as the "secretarial amount." See App., *infra*, 4a. Second, the ISDA directs the Secretary to add to that amount certain direct and indirect costs known as "contract support costs," or "CSCs." 25 U.S.C. 450j-1(a)(2). CSCs are costs for "activities that must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," but which normally would not be incurred by

[1] The ISDA defines "Secretary" to mean either the Secretary of the Interior, or the Secretary of Health and Human Services, or both. 25 U.S.C. 450b(i). This case involves only contracts between an Indian Tribe and the Secretary of Health and Human Services.

the Secretary in his direct management of the program or would have been provided from resources other than those under contract. *Ibid.* In general, contract support costs are calculated by multiplying the amount otherwise payable to the Tribe by an "indirect cost rate" determined by negotiation.[2] In this case, for example, respondent's indirect cost rate was 14.3% for fiscal year 1994, 17.1% for fiscal year 1995, and 12.2% for fiscal year 1996. See App., *infra*, 8a, 75a.

The Secretary's obligation to fund self-determination contracts is limited, however, by 25 U.S.C. 450j-1(b), which is entitled "[r]eductions and increases in amount of funds provided." At issue here is the concluding paragraph of Section 450j-1(b). It states:

> 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.

25 U.S.C. 450j-1(b); see also 25 U.S.C. 450j(c) ("The amounts of such [self-determination] contracts shall be subject to the availability of appropriations.").

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[2] Each tribal entity's indirect cost rate is determined through an annual negotiation with the Department of the Interior's Office of the Inspector General, pursuant to Office of Management and Budget Circular No. A-87, 46 Fed. Reg. 9548 (1981); App., *infra*, 7a-8a n.2, although Tribes may request direct contract support costs for certain costs not included in the indirect cost rate. 1 C.A. App. 97-98. The same methodology for calculating contract support costs is reflected in the Annual Funding Agreements negotiated between the contracting Tribes and IHS. See, *e.g.*, *id.* at 171 (fiscal year 1994 funding agreement); *id.* at 276 (fiscal year 1995); *id.* at 344 (fiscal year 1996).

In general, self-determination contracts must incorporate the terms of a model agreement, which includes a similar proviso. See 25 U.S.C. 450*l*(c) (Model agreement, § 1, ¶(b)(4)) (clause stating that, "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement"). In addition, Congress established a mechanism for monitoring any appropriations shortfalls by requiring the Secretary to report "any deficiency in funds needed to provide required contract support costs." 25 U.S.C. 450j-1(c)(2).

Congress enacted a further limit on spending for contract support costs in 1998. Between 1994 and 1998, the committee reports accompanying the annual appropriations for the Department of Health and Human Services and the Indian Health Service had "earmarked" certain sums for contract support costs. See pp. 6-7, *infra*. In 1998, Congress enacted a statutory provision barring IHS from expending more than the sums thus "earmarked" for contract support costs for each relevant fiscal year. In particular, Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-288 (Section 314), provides that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." At the same time, Congress began imposing, in the annual appropriations acts, a statutory cap on payments for contract support costs for succeeding fiscal years.[3]

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[3] See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1583 (1997)

2. The Current Controversy. The dispute in this case arises from shortfalls in funding for contract support costs associated with self-determination contracts for fiscal years 1994-1996.

a. *Funding for contract support costs.* In the relevant fiscal years, Congress provided for separate treatment of contract support costs relating to ongoing (*i.e.*, already existing) programs, and those relating to new or expanded programs. For fiscal year 1994, the House Committee on Appropriations recommended that, of the approximately $1.6 billion appropriated to IHS, approximately $135 million be used to pay contract support costs for ongoing programs. See H.R. Rep. No. 158, 103d Cong., 1st Sess. 100, 104 (1993). For fiscal year 1995, the Committee increased that amount to about $146 million. H.R. Rep. No. 551, 103d Cong., 2d Sess. 103 (1994). And for fiscal year 1996, the Committee further increased that amount to $153 million. H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995).

In addition, in each of those years, Congress segregated $7.5 million from the lump-sum Indian Health Services appropriation and specified that it was to be used to pay contract support costs for new or expanded

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("not to exceed $168,702,000 shall be for payments to tribes * * * for [CSCs] 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"); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-278 to 2681-279 (1998); Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, 113 Stat. 1501A-181 to 1501A-182; Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 978-980 (2000); Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 456 (2001); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 260-261 (2003).

programs. The relevant appropriations act in each of those years provided that, "of the funds provided," $7.5 million was to "remain available until expended" in an "Indian Self-Determination Fund," which was to "be available for the transitional costs of initial or expanded tribal contracts." Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1408 (1993); see *Joint Explanatory Statement of the Comm. of Conf.*, 139 Cong. Rec. 24,850 (1993) (conference bill "[e]armarks $7,500,000 for the self-determination fund instead of $8,000,000 as proposed by the House and $7,000,000 as proposed by the Senate"); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2528 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

Because of chronic congressional under-funding, IHS —in consultation with tribal representatives—developed an allocation policy (ISDM 92-2) to deal with anticipated appropriations shortfalls. 1 C.A. App. 84-92. In accordance with that policy, IHS placed all requests for contract support costs for new or expanded ISDA contracts on a priority list called the Indian Self-Determination Queue. *Id.* at 102. Approved requests for contract support costs for new or expanded projects were then 100% funded on a first-come, first-served basis, as determined by the date on which the request was received, until the $7.5 million Indian Self-Determination Fund for that year was exhausted. *Ibid.* When additional Indian Self-Determination Fund appropriations for new or expanded contract support costs became available the next fiscal year, the IHS would pay the contract support costs to Tribes with outstanding requests on the queue. Unfunded requests

thus remained on the queue in priority order awaiting funding from future Indian Self-Determination Fund appropriations. 2 C.A. App. 449-450. Consistent with the committee reports and appropriations acts, in each of the relevant years, IHS allocated not only the funds necessary to pay the secretarial amounts under ISDA contracts, but also the full amount earmarked in the committee reports for contract support costs for ongoing programs, as well as the full $7.5 million segregated for contract support costs for new or expanded programs. In each of the relevant years, there was nonetheless a shortfall for the payment of contract support costs ranging from $21.9 million to $34.6 million. See Dep't of Health and Human Services, Indian Health Service, *Fiscal Year 1998 Justification of Estimates for Appropriations Committees* 117 (1997).[4]

b. *The government-to-government agreements.* Respondent is a federally recognized Indian Tribe that has operated various IHS-funded health care programs under self-determination contracts for many years. 2 C.A. App. 394-395. On June 30, 1993, respondent entered into a Compact of Self-Governance and associated Annual Funding Agreement with the United States that covered pre-existing programs already subject to self-determination agreements. 1 C.A. App. 70-83.[5]

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[4] In fiscal year 1999, Congress omitted the Indian Self-Determination Fund from the Indian Health Services appropriation. As a result, IHS has changed its contract support cost distribution methodology.

[5] The Tribe and the United States originally entered into a compact pursuant to Title III of the ISDA (25 U.S.C. 450f note (1994)), a demonstration project known as the Tribal Self-Governance Project. After reviewing the results of the project, Congress repealed Title III and enacted, in its place, provisions that permanently establish tribal self-governance programs within

The Compact expressly states that the Secretary's provision of funds to respondent, as specified in the Annual Funding Agreements, will be subject to the appropriation of funds by Congress and subject to such limits as Congress may enact:

> Section 3—Funding Amount. *Subject only to the appropriation of funds by the Congress of the United States*, and to adjustments pursuant to [25 U.S.C. 450j-1], as amended the Secretary shall provide to the [Cherokee] Nation the total amount of funds specified in the Annual Funding Agreement * * *. In accordance with [25 U.S.C. 450f] as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

Compact of Self-Governance Between the United States of America and the Cherokee Nation, Art. IV, § 3 (June 30, 1993) (1 C.A. App. 73) (emphasis added). The Annual Funding Agreement for fiscal year 1994 similarly declared that "[t]he parties agree that adjustments may be made due to Congressional action." 1 C.A. App. 171. Respondent's Annual Funding Agreements for the ensuing fiscal years have similar terms.[6]

HHS. See Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, §§ 501-519, 114 Stat. 713-731 (codified at 25 U.S.C. 458aaa to 458aaa-18). Because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, see 25 U.S.C. 450j-1(b), the terms "contract" and "compact" have been used interchangeably by the parties and the courts.

[6] See, *e.g.*, 1 C.A. App. 277 (funding agreement for fiscal year 1995, which states "that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation

In 1995, because of budgetary shortfalls, the Secretary paid respondent about $3.2 million in contract support costs for ongoing programs, approximately $945,000 less than respondent had sought. In addition, in 1996, respondent requested approximately $777,000 in additional contract support costs for new and expanded programs for which it had assumed responsibility in previous fiscal years. 1 C.A. App. 119. Consistent with the allocation policy that IHS had established in ISDM 92-2 after consultation with tribal representatives, see pp. 7-8, *supra*, the latter request was placed in the Indian Self-Determination queue. 1 C.A. App. 119, 136, 152; 2 C.A. App. 427-428. The request did not reach the top of the queue before the $7.5 million allotted for such costs was exhausted. As a result, respondent did not receive additional funding for contract support costs for new programs in fiscal year 1996.

3. The Administrative Decisions. On September 27, 1996, respondent submitted a claim to IHS pursuant to the Contract Disputes Act, alleging that it was entitled to additional contract support costs in the amount of $6,369,009 for fiscal years 1994 through 1996. See App., *infra*, 9a. The IHS contracting officer denied respondent's claim. *Id.* at 74a-78a. The contracting officer explained that, although respondent had a shortfall, the IHS could not meet respondent's full request because: (1) Congress failed to appropriate sufficient funds for contract support costs for all Tribes; (2) respondent's compact and Section 450j-1(b) of the ISDA state that the provision of funds under the Annual Funding Agreements is subject to the availability of appropria-

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notified of such actions."); *id.* at 345 (funding agreement for fiscal year 1996, in which the parties agree "that adjustments may be appropriate due to unanticipated Congressional action").

tions; (3) the Annual Funding Agreements contain various provisions indicating that the amount specified for contract support costs was not a sum certain and that further adjustments would be made based on congressional action and further negotiation between the parties; and (4) Section 450j-1(b) "makes it clear that IHS is not required to meet [respondent's] total need for indirect costs where such action would reduce the funds otherwise available to other tribes." App., *infra*, 76a-77a.

Respondent sought review before the Interior Board of Contract Appeals (the IBCA) pursuant to 41 U.S.C. 606, and the IBCA concluded that respondent was entitled to full payment of its contract support costs. App., *infra*, 50a-73a. The IBCA first rejected the Secretary's reliance on Section 450j-1(b), which makes payments "subject to the availability of appropriations" and provides that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contracts. *Id.* at 67a-68a. The IBCA concluded that IHS had a "sufficient unrestricted lump-sum appropriation available to it" to pay CSCs. *Ibid.*

The IBCA also rejected the Secretary's argument that Section 314 of the Emergency Supplemental Appropriations Act for fiscal year 1999 bars recovery by declaring that the amounts "appropriated to or earmarked in the committee reports" for contract support costs "are the total amounts available for fiscal years 1994 through 1998 for such purposes." The IBCA stated that Section 314 is "merely appropriations Act language" that does not "extinguish" respondent's right to full funding for contract support costs under its agreements. App., *infra*, 69a-71a. The IBCA further concluded that Section 314 did not preclude resort to

the Judgment Fund, 31 U.S.C. 1304, to pay contract support costs. App., *infra*, 71a-72a.

The IBCA denied the Secretary's request for reconsideration. App., *infra*, 43a-49a. The IBCA acknowledged that, under Section 450j-1(b), the Indian Health Service did not need to fund contract support costs fully where appropriations were insufficient and paying contract support costs would result in "the potential reduction of funds to other tribes and other programs." *Id.* at 46a. But it rejected the Secretary's reliance on that provision because, according to the IBCA, many of the affected programs were "clearly discretionary" and the Secretary failed to provide "adequate" or "convincing proof * * * that any actual reduction of funds for other tribes would be required to fully fund" respondent's contract support costs. *Id.* at 47a.[7]

4. The Federal Circuit's Decision. The United States Court of Appeals for the Federal Circuit affirmed. App., *infra*, 1a-35a. In so doing, that court expressly "disagree[d] with the approaches of the Ninth and Tenth Circuit[s]," which had upheld the Secretary's position "in nearly identical litigation." *Id.* at 17a-18a.

a. The Federal Circuit agreed that, in general, an agency may not spend in excess of an express limit or cap contained in an appropriations act. App., *infra*, 12a-13a. Nonetheless, the court stated that, in the absence of such a statutory limit, "an agency is *required* to re-

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[7] At the parties' request, the IBCA initially deferred calculating damages pending review in the Federal Circuit. Following the filing of a notice of appeal, however, the Federal Circuit determined that, because no damages had yet been awarded, the IBCA's decision was non-final and therefore unreviewable. App., *infra*, 10a n.4. Accordingly, the parties stipulated to damages of $8.5 million, plus interest from September 30, 1996, and the IBCA entered a final order accepting the stipulation. *Id.* at 12a, 38a-42a.

program if doing so is necessary to meet debts or obligations." *Id.* at 16a.

Addressing contract support costs for ongoing programs first, the court of appeals held that, because there were no express statutory limits on the payment of such costs, the Secretary was required to pay them in full. App., *infra*, 18a-22a. The Federal Circuit did not dispute that the committee reports accompanying the appropriations act for each of the relevant fiscal years recommended specific sums for contract support costs and that those sums were insufficient to pay respondent's requested costs. But the Federal Circuit held that the Secretary had no discretion to follow the allocations set forth in the committee reports, because committee reports cannot render funds unavailable so as to "excuse the Secretary from fulfilling his duty under the contracts * * * to pay full contract support costs." *Ibid.*

The court applied similar analysis to the claim for contract support costs for new or expanded programs. App., *infra*, 22a-26a. The court of appeals noted that, in the appropriations act for each year in question, Congress had segregated $7.5 million for contract support costs for new and expanded programs in the Indian Self-Determination Fund, providing that the $7.5 million fund "shall be available" for that purpose. *Id.* at 22a. The court concluded, however, that the $7.5 million set-aside could not be construed as specifying the full amount available for that purpose because Congress had not used the phrase "not to exceed" or similar language in the appropriations acts. *Id.* at 24a-25a.

The Federal Circuit also rejected the Secretary's reliance on Section 314, which provides that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports

* * * for contract support costs are the total amounts available for fiscal years 1994 through 1998 for such purposes." App., *infra*, 26a. The court stated that respondent's "right to the contract support costs vested long before the passage" of that provision. *Id.* at 27a. The Federal Circuit also refused to read Section 314 as clarifying Congress's intent to limit the funding available for contract support costs in the relevant fiscal years to the amounts earmarked in the committee reports. *Id.* at 29a. Instead, it construed Section 314 to prohibit "the *future* obligation of unspent appropriated funds" for those fiscal years. *Id.* at 29a-30a.[8]

b. The Federal Circuit also rejected the Secretary's contention that funding respondent's contract support costs would have required IHS to reduce funding for programs serving other Tribes. App., *infra*, 31a-34a. Following oral argument, the Federal Circuit twice requested the submission of supplemental briefs and evidence regarding whether there were unobligated funds in IHS's budget at the end of the relevant fiscal years. *Id.* at 31a-32a. Although the government argued that the issue should be addressed by the IBCA on remand—the IBCA having declined the government's request for a hearing on that very issue—the Federal Circuit declined to remand. *Id.* at 33a; see *id.* at 11a. Instead, the Federal Circuit relied on the parties' appellate submissions to make its own findings.

In its supplemental briefs, the government acknowledged that there may have been minor unobligated

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[8] The Federal Circuit also held that Section 314 does not bar respondent from recovering from the Judgment Fund, reasoning that "[d]amages for breach of contract may be awarded out of the Judgment Fund when payment is not otherwise provided for." App., *infra*, 31a (citing *Lee* v. *United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997)).

balances remaining in each of the fiscal years, but explained that those amounts were not sufficient to pay respondent and all of the other Tribes ahead of respondent on the Indian Self-Determination queue their full contract support costs. The government also pointed out that, because IHS's annual lump-sum appropriations were "one-year" funds, those monies are no longer available to pay contract support costs for the fiscal years in dispute. Gov't C.A. Supp. Br. 6-8. Finally, the Secretary provided a line-by-line explanation of how IHS allocated its annual lump-sum appropriation during the relevant fiscal years. Gov't C.A. Rev. Supp. Br. 7-8, Addendum 5a-14a.

Based on those materials, the Federal Circuit found that, in each fiscal year, IHS spent between $25 and $35 million on "inherently federal functions." App., *infra*, 32a. Inherently federal functions are activities "so intimately related to the public interest as to mandate performance by Government employees," including the operation of a federal agency, interpreting the law, entering into contracts, and paying out federal funds. Office of Federal Procurement Policy, Office of Management and Budget, *Policy Letter on Inherently Governmental Functions*, 57 Fed. Reg. 45,100 (1992). Such functions "cannot legally be delegated to Indian tribes." 25 U.S.C. 458aaa(4). According to the Federal Circuit, however, funds used for inherently federal functions do "not constitute 'funding for programs, projects, or activities serving a tribe'" within the meaning of Section 450j-1(b) and thus can be reprogrammed to pay contract support costs for Tribes. App., *infra*, 32a-33a. The court then held such reprogramming to be mandatory, relying on 25 U.S.C. 450j-1(b)(3), which states that ISDA funding "'shall not be reduced by the Secretary to pay for Federal functions.'" App., *infra*, 33a.

REASONS FOR GRANTING THE PETITION

This case raises the same issues as the petition for a writ of certiorari in *Cherokee Nation* v. *United States*, No. 02-1472 (filed Apr. 3, 2003) (*Cherokee I*). As explained in the supplemental briefs submitted to this Court in *Cherokee I*, see 02-1472 Pet. Supp. Br. 3-6; 02-1472 Gov't Supp. Br. 4, the Federal Circuit's decision in this case conflicts with the decision of the Tenth Circuit at issue in *Cherokee I*, and with the decision of the Ninth Circuit in *Shoshone-Bannock Tribes* v. *Secretary, Dep't of Health & Human Services*, 279 F.3d 660 (2002). In view of that conflict, the government's supplemental brief in *Cherokee I* stated that the government "does not oppose further review in th[at] case." 02-1472 Gov't Supp. Br. 5. For the reasons stated below, if this Court grants the petition for a writ of certiorari in *Cherokee I*, it should grant the petition in this case as well and consolidate the cases for briefing and argument. Alternatively, the petition in this case should be held pending decision in *Cherokee I* and then disposed of as appropriate in light of the decision in that case.

1. This case concerns the extent of the Secretary's obligation to pay contract support costs under Indian Self-Determination contracts. Under the ISDA and the relevant government-to-government funding agreements, the Secretary's obligation to pay such costs is subject to at least two limits. First, such payments are "subject to the availability of appropriations." Second, the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b); pp. 9-10 & note 6, *supra* (agreements). Both limits apply "[n]otwithstanding any other provision" of the ISDA. 25 U.S.C. 450j-1(b).

Those limits reflect the fact that self-determination agreements are not government procurement contracts —they are not purchases for the federal government. Instead, they are governmental funding arrangements under which the Tribes are substituted for a federal agency both in furnishing governmental services and in receiving federal funding for that purpose. See 25 U.S.C. 450f(a)(1); *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51-56 (1986); cf. 25 U.S.C. 450f(d) (deeming employees of tribal entities operating under self-determination contracts to be federal employees for purposes of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674). A federal agency administering programs directly is constrained by the availability of appropriations and the need to allocate funds among competing needs. Section 450j-1(b) makes the same principle applicable to Tribes operating in the agency's stead. In this case, the Federal Circuit misconstrued and misapplied Section 450j-1(b), creating a conflict with the decisions of the Ninth and Tenth Circuits on at least three issues.

a. First, the Federal Circuit disagreed with the Ninth and Tenth Circuits on how to determine the "availability" of appropriated funds within the meaning of Section 450j-1(b). In the relevant years, Congress did not appropriate sufficient money to fund all of the agency's programs serving Tribes, and the committee reports accompanying the appropriation acts identified specific sums to be used for contract support costs. See pp. 6-7, *supra*. The Tenth Circuit held that the Secretary had discretion to follow the committee reports in the face of funding shortfalls. See App., *infra*, 19a-20a (citing *Cherokee I*, 311 F.3d at 1062-1063); 1 General Accounting Office, *Principles of Federal Appropriations Law* 3-34 (2d ed. 1991) (agency with an insufficient

appropriation has "discretion" to establish "reasonable classifications" and "priorities" in allocating funds).

Declaring that it "cannot agree," App., *infra*, 20a, the Federal Circuit held that the Secretary lacked discretion to follow the allocations set forth in the committee reports. In particular, the Federal Circuit held that only express funding caps enacted in the text of an appropriations act or another statute can have the effect of limiting "availability" so as to "excuse the Secretary from fulfilling his duty under the contracts." *Id.* at 21a-22a. Funds are "available," the Federal Circuit stated, whenever the total lump-sum appropriation exceeds the amount obligated by the agency at the moment of the appropriation, without regard for the needs of other programs or the agency's need to operate throughout the year. *Id.* at 27a.

The Federal Circuit's view that appropriations can be rendered "unavailable"—so as to permit non-payment under Section 450j-1(b)—only by an express funding cap is incorrect. An express statutory cap is *by itself* sufficient to bar an agency from obligating or paying funds in excess of the cap, *even absent* a "subject to the availability of appropriations" provision like Section 450j-1(b). App., *infra*, 12a-13a; 31 U.S.C. 1341(a)(1) (prohibiting any officer from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation"). The Federal Circuit's construction thus renders Section 450j-1(b) largely superfluous.

The Federal Circuit's construction also ignores the fact that, in establishing these government-to-government funding arrangements, Congress was not purchasing services from the Tribes, but substituting the Tribes for a federal agency in the provision of services to their members and the receipt of federal funds to

that end. See p. 17, *supra*. Consistent with those arrangements, by making the Tribes' receipt of funds subject to the "availability of appropriations," Section 450j-1(b) constrains the Tribes with the budgetary restrictions the Secretary would face if operating the programs himself. For similar reasons, the Federal Circuit erred in describing the question here as whether the Secretary can be "excused" from "fulfilling his contract obligations" because of under-funding. See App., *infra*, 17a; see *id.* at 27a (finding contractual "right" to contract support costs). The question is whether, given that Section 450j-1(b) and the relevant agreements made the payment obligation itself subject to the "availability" of appropriations, Section 450j-1(b) imposed a payment obligation to begin with, despite the absence of full congressional funding.

The Federal Circuit also parted company with the Ninth and Tenth Circuits on whether the relevant appropriation acts, by establishing a segregated fund for a specified purpose, could be understood to make that segregated fund the full amount "available" for that purpose. In each of the fiscal years at issue here, the appropriation act stated that, "of the funds provided," $7.5 million shall remain available until expended for the "Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts," *i.e.*, for contract support costs for new or expanded contracts. See p. 7, *supra*. Holding the appropriations acts to be ambiguous, the Ninth and Tenth Circuits referred to the relevant legislative history and concluded that Congress had intended the $7.5 million to be the maximum to be spent on contract support costs for new and expanded programs. See App., *infra*, 24a-25a (citing and quoting *Cherokee I*, 311

F.3d at 1063-1064, 1065 n.10; *Shoshone-Bannock*, 279 F.3d at 666).

In this case, the Federal Circuit reached the opposite conclusion, declaring "that the Ninth and Tenth Circuit decisions were incorrect." App., *infra*, 24a. Instead, the Federal Circuit held that the appropriations acts unambiguously made $7.5 million the minimum amount to be spent for that purpose. *Id.* at 25a-26a. Contrary to the Federal Circuit's conclusion, the GAO—which the Federal Circuit deemed to be "expert"—recognizes that the phrase "'shall be available'" can be "said to contain an element of ambiguity." 2 *Principles of Federal Appropriations Law*, *supra*, at 6-7. As the GAO has explained, some decisions have read that language "to constitute a maximum but not a minimum"; others have read it as establishing a minimum only; and more recent decisions hold that "whether it is a maximum or a minimum" ultimately "depends on the underlying congressional intent." *Ibid.* In this case, Congress's declaration that, "of the funds provided," a segregated $7.5 million fund "shall be available for" CSCs for new or expanded contracts is reasonably understood to indicate that the other funds provided are not available for that purpose, particularly given "accompanying Committee Report language stating only $7.5 million was intended to be available * * *, an amount which IHS has duly spent." App., *infra*, 51a-52a.

b. Second, the Federal Circuit's decision squarely conflicts with the decisions of the Ninth and Tenth Circuits on the construction of Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, and its relationship to the "availability" proviso of Section 450j-1(b). As noted above, in each of the relevant fiscal years, the appropriations act

allocated $7.5 million for CSCs for new and expanded contracts, and the committee report identified the total amount to be spent on all contract support costs. Confronted with litigation over the effect of those provisions, Congress enacted Section 314 in 1998 to declare that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681-288. Interpreting that language, the Tenth Circuit held that—whether or not the earmarks in the conference reports were themselves binding in the first instance—Section 314 created a "legally binding" statutory restriction by making those earmarked amounts the total sum that could be used to pay contract support costs. "Congress could not have been clearer as to its intent." *Cherokee I*, 311 F.3d at 1065. The Ninth Circuit reached the same conclusion, declaring that Section "314 is unambiguous. Congress plainly said that the appropriated amounts were the total amounts available." *Shoshone-Bannock*, 269 F.3d at 955-956.

"Once again," the Federal Circuit "disagree[d]" with the Ninth and Tenth Circuits' construction. App., *infra*, 28a-29a. Congress, the Federal Circuit stated, "was merely prohibiting the *future* obligation of unspent appropriated funds" and was not establishing or clarifying that "the earlier statutes imposed a statutory cap." *Id.* at 29a-30a. But Section 314 nowhere proscribes (or mentions) the "future obligation" of "unspent" funds. Rather, Section 314 states that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * *are the total amounts available* for fiscal years 1994 through

1998 for such purposes." 112 Stat. 2681-288 (emphasis added). It thus unambiguously declares that the appropriated or earmarked amounts—and no more—may be spent on contract support costs for the relevant years.[9]

The Federal Circuit's construction also ignores the provision's legislative history and context. "[I]n several cases," the Senate Report explained, "the Federal courts have held the United States liable for insufficient CSC funding. The Committee believes the situation needs to be addressed." S. Rep. No. 227, 105th Cong., 2d Sess. 52 (1998). Indeed, Section 314 was enacted as part of an annual appropriation that, for the first time, placed statutory caps on funding for contract support costs in the next fiscal year. See pp. 5-6 & note 3,

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[9] For that reason, the Federal Circuit also erred in suggesting that it was permissible to pay contract support costs by awarding damages from the Judgment Fund, 31 U.S.C. 1304. Section 314 declares that the sums "appropriated" or "earmarked" are "*the total amounts available* * * * for such purposes," "[n]otwithstanding *any other provision of law*." 112 Stat. 2681-288 (emphasis added). By nevertheless authorizing recourse to the Judgment Fund to pay contract support costs, the Federal Circuit contravened an express limit on payments established by Congress. See U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (resort to Judgment Fund not proper unless Congress established a right to money); *Rochester Pure Waters Dist.* v. *EPA*, 960 F.2d 180, 185-186 (D.C. Cir. 1992) (no funds available where Congress rescinds the appropriation); *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (where "the relevant appropriation has lapsed or been fully obligated * * * the federal courts are without authority to provide monetary relief"). That result is particularly inappropriate given that, under the Contract Disputes Act, the responsible agency must reimburse the Judgment Fund from appropriated funds. See 41 U.S.C. 612(a) and (c).

supra. Section 314 thus was clearly intended to establish a similar statutory cap for the preceding fiscal years by incorporating the appropriations or earmarks in the committee reports for the prior years into an Act of Congress as binding law.

The Federal Circuit's contrary construction makes no sense on its own terms. That court nowhere explained why Congress would have thought it necessary or useful to bar the "future obligation" of "unspent" funds from the earlier years, given that the agency automatically loses the ability to obligate such "one-year" funds at the end of each fiscal year. See 31 U.S.C. 1301(c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears").[10] Moreover, when Congress enacted Section 314 in 1998, IHS had informed Congress, pursuant to 25 U.S.C. 450j-1(c)(2), that it had exhausted its appropriations and that the appropriated money was insufficient to pay the full amount of contract support costs required by the Tribes. See *1998 Justifications of Estimates*, *supra*, at 116-117. The Federal Circuit made no effort to explain why Congress would have sought to bar the "future obligation" of "unspent" funds after being advised that there were no unspent funds left for that purpose.

c. Third, the Federal Circuit's decision in this case appears to depart from the Tenth Circuit's approach when determining the "availability" of funds needed for inherently federal functions, and whether reprogram-

[10] Congress provided that the $7.5 million Indian Self-Determination Fund for new and expanded contracts would "remain available until expended," but it is undisputed that the agency exhausted that $7.5 million fund. See App., *infra*, 22a n.12, 51a-52a.

ming such funds to pay contract support costs would "reduce funding for programs, projects or activities serving a tribe," 25 U.S.C. 450j-1(b). In *Cherokee I*, the district court found, and the Tenth Circuit agreed, that funds may be unavailable for contract support costs in view of competing demands on IHS's limited resources. Those courts, moreover, did not question that funds required to perform "inherently federal functions"—operations that cannot be contracted out to the Tribes, such as having an Indian Health Service, interpreting relevant laws, entering into contracts, and paying out federal funds—are not meaningfully "available" to pay contract support costs. Nor did they question that eliminating inherently federal functions (in effect shutting the agency down) would adversely affect other "activities serving a tribe" within the meaning of 25 U.S.C. 405j-1(b). In this case, in contrast, the Federal Circuit concluded that those funds nevertheless are "available" to pay contract support costs. App., *infra*, 32a-33a. Indeed, the court concluded that 25 U.S.C. 405j-1(b)(3) actually *precludes* IHS from using funds to perform inherently federal functions where there is a shortfall for a Tribe's contract support costs. App., *infra*, 33a.

Once again, the Federal Circuit erred. To the extent the Federal Circuit construed Section 450j-1(b)(3) as deeming funds "available" even though those funds are needed for inherently federal functions, it is absurd. Under that approach, for example, virtually all of IHS's budget for federal functions in 1996 (about $35.9 million) would be deemed "available" for, and would have had to be reprogrammed to pay, the $34.6 million shortfall for contract support costs for Tribes for that year. Because an agency cannot spend or obligate sums beyond those appropriated, that would have required

the agency to fire virtually all of its employees and to cease operating. Section 450j-1(b)(3), and the concept of "availability" generally, cannot reasonably be understood to require that result. The consequences would be not merely to vitiate Congress's direction that the Indian Health Service exist and that it fulfill its statutory mission of serving the Indian Tribes and their members;[11] it would also place the ISDA at war with itself. The ISDA cannot function—no funding arrangements with the Tribes can be negotiated and satisfied—absent a functioning IHS with employees who can engage in the inherently federal function of entering into the agreements and authorizing payment thereunder. The court of appeals' construction thus contravenes this Court's direction that an Act of Congress "cannot be held to destroy itself," *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (quoting *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)), and ignores the need to "make sense rather than nonsense out of the *corpus juris*," *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In any event, because serving the health interests of the Tribes and their members *is* IHS's function, any requirement that the agency in effect shut down to pay certain Tribes' contract support costs would inevitably impair other "activities serving a tribe," something that Section 450j-1(b) expressly says the Secretary is not required to do.

To reach the contrary result, the Federal Circuit relied on Section 450j-1(b)(3), which states that "[t]he amount of funds required by subsection (a)" of Section

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[11] See, *e.g.*, 25 U.S.C. 1631 (establishing IHS); 25 U.S.C. 1601(a) (health services are "required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people").

450j-1 "shall not be reduced by the Secretary to pay for Federal functions, including but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring." 25 U.S.C. 450j-1(b)(3). But the provisos limiting the Secretary's obligations—that "the provision of funds * * * is subject to the availability of appropriations" and that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contract costs—apply "*[n]otwithstanding any other provision in this subchapter*," 25 U.S.C. 450j-1(b) (emphasis added), necessarily including Section 450j-1(b)(3). "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

In any event, this case does not involve a Secretarial decision to "reduce" funding to the Tribes to pay for federal functions within the meaning of Section 450j-1(b)(3). The funds devoted to those functions have never been treated as available to pay for services the Tribes provide under contract to begin with, precisely because the Tribes cannot perform inherently federal functions. Indeed, 25 U.S.C. 450f(a) states that the activities that may be the subject of an ISDA contract with a Tribe include only those administrative functions "that are otherwise contractable." See also 25 U.S.C. 458aaa(4) (for purpose of Tribal Self-Governance Program, "inherent Federal functions 'means those federal functions which cannot legally be delegated to Indian tribes'"). That provision necessarily presupposes that there are inherently federal functions that must be performed by IHS, and that funds must be paid out of

the lump-sum appropriation to support them. And the Secretary did not "reduce" contract support payments to the Tribes from one year to the next; the Secretary simply declined to *increase* them beyond the increases identified by the committee reports in light of limited appropriations.

2. In light of the circuit conflicts described above, the government, in its supplemental brief in *Cherokee I*, did not oppose the petition for a writ of certiorari in that case. At the same time, as also noted in the government's supplemental brief in that case, the conflicts may not have broad forward-looking significance. Since fiscal year 1998, Congress has regularly included express caps on funding for contract support costs in the annual appropriations legislation funding Indian Self-Determination Contracts. See p. 6 & note 3, *supra*. There is no disagreement that such express caps render payments beyond the amounts specified "unavailable" within the meaning of the ISDA. See App., *infra*, 12a-13a (citing cases). As a result, disputes such as the present one, which concern the availability of money for the purpose of IHS's payment of contract support costs, are unlikely to arise in the future. There are, however, several pending cases (including two putative class actions) that concern years before Congress began to use express funding caps. As a result, the Indian Health Service could face liability of up to $100 million.

In addition, the Federal Circuit's decision may have significant ongoing programmatic consequences for the Indian Health Service if that decision is read to hold that funds needed for inherently federal functions—including having an IHS that can enter into contracts with Tribes and administer programs for which IHS remains directly responsible—are nevertheless deemed to be "available" to pay Tribes under the ISDA. See

pp. 24-25, *supra*. As explained above (see *ibid.*), such a construction could impair the agency's operation, impede administration of programs for the benefit of the Tribes, and prevent administration of the ISDA itself. In the same way, the decision could also have adverse consequences for the Department of the Interior. Because of those concerns in particular, review by this Court does seem warranted.

As between this case and *Cherokee I*, the decision in *Cherokee I* has the benefit of a full record compiled in trial court, as well as concurrent findings of fact by the district court and court of appeals. Those features may help limit factual disputes that could complicate decision of the legal issues.[12] This case, in contrast, is marred by the Federal Circuit's effort to develop a factual record on appeal through post-argument briefing, as well as the questionable appellate factfinding that resulted.[13] Because the government had not yet

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[12] See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (Court generally will not revisit the "concurrent findings of fact by two courts below") (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); *United States* v. *Doe*, 465 U.S. 605, 614 (1984). As the government's Brief in Opposition in *Cherokee I* explained, petitioners in that case have suggested disagreement with the district court's and the court of appeals' conclusion that the Secretary had exhausted appropriated funds. See 02-1472 Br. in Opp. 15 n.5. The Court, however, could decline to entertain that contention in view of the concurrent finding rule in *Goodman*, and because petitioners in that case failed to present the supposed evidence of unspent funds (a Presidential budget report) to the district court in a timely fashion. See 02-1472 Br. in Opp. 15 n.5.

[13] For example, the Federal Circuit concluded that, even setting aside the sums spent on inherently federal functions, the agency had minor unexpended balances (ranging from $1.25 million to $6.8 million) at the end of some of the relevant years. That "finding" would not, however, bar this Court's review of whether money required to perform inherently federal functions is "available" within

completed its ordinary processes for considering the filing of a petition for a writ of certiorari in this case at the time it filed its supplemental brief in No. 02-1472, those differences were not so immediately obvious. Thus, to the extent review of the issues here is appropriate, the superior record in *Cherokee I* now seems, on balance, to weigh in favor of granting review in that case.

As the government's Supplemental Brief in *Cherokee I* notes (at 4), however, there is one issue with respect to which this case appears to be a superior vehicle. While the Federal Circuit expressly addressed the effect of Section 450j-1(b)(3), the Tenth Circuit's decision in *Cherokee I* does not, primarily because petitioners did not timely press that provision before the Tenth Circuit in *Cherokee I*. Nonetheless, Section 450j-1(b)(3) was mentioned in the Tribes' opening brief in the court of appeals in *Cherokee I*, and the Tribes relied on it more expressly in their petition for rehearing. Moreover, the Tribes rely on that provision in their petition in *Cherokee I* in this Court to support their contention that the ISDA supports their position. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Under these circumstances, we are not prepared to object to addressing Section 450j-1(b)(3) in *Cherokee I*, especially since

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the meaning of Section 450j-1(b). First, the allegedly unexpended sums would not be sufficient to pay respondent and the numerous Tribes ahead of respondent in the self-determination queue in full. Indeed, in the relevant years, the contract support cost shortfalls ranged between $21.9 million and $34.6 million. Second, the panel ignored the government's concern that the cited surpluses often were comprised of money that was not actually available during the relevant fiscal year, but appeared later because of accounting adjustments. See 31 U.S.C. 1552(a), 1553.

that provision was addressed by the Federal Circuit in this case, which also involves the Cherokee Nation.

Nonetheless, if the Court concludes that review is warranted on the issues raised in these funding disputes, the most prudent course would be to grant the petitions for a writ of certiorari in this case and in *Cherokee I* and to consolidate the cases for both briefing and argument. That would ensure full consideration of all issues. In the alternative, if the Court wishes to review only one case, the government is on balance inclined to favor review in *Cherokee I*, in view of its superior record and concurrent findings of fact.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for briefing and argument with *Cherokee Nation of Oklahoma, et al.* v. *United States*, No. 02-1472 (*Cherokee I*). In the alternative, the petition in this case should be held pending the decision in *Cherokee I* and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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