Appropriating Availability: Reconciling Purpose and Text under the Indian Self-Determination and Education Assistance Act

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The Indian Self-Determination and Education Assistance Act[1] (ISDEAA) requires the federal government to enter into a "self-determination" contract with any Native American tribe[2] that requests one. A self-determination contract gives the tribe funding for programs and allows it to provide services previously administered by the federal government. Such a contract gives the tribe the amount that the government would have spent to plan, conduct, and administer the program itself.[3] In addition, the federal government must provide the tribe funding for "contract support costs," the additional transaction costs incurred by a Native American tribe endeavoring to plan, conduct, and administer its own programs without the government's help.[4] Contract support costs can be either start-up costs in the case of initial contracts, or continuous costs of running a program in the case of ongoing contracts.

Funding for self-determination contracts derives from moneys appropriated by Congress for the Indian Self-Determination Fund. Congress appropriates funding for the Indian Self-Determination Fund in the appropriation act applicable during the year that the contract is to be completed. Funding under the ISDEAA is not unlimited. In § 450j-1(b), the ISDEAA specifically provides for two funding limitations: (1) the Availability Clause provides that funding for self-determination contracts is subject to the availability of appropria-

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1 Pub L No 93-638, 88 Stat 2203 (1975), codified as amended at 25 USC § 450 et seq (2000).

2 The words "Native American" will be used to refer to the tribes who benefit from the ISDEAA, and the word "Indian" will only be used when reference to original text demands.

3 See 25 USC § 450j-1(a)(1) ("The amount of funds provided under the terms of the self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided.").

4 See *Ramah Navajo Chapter v Lujan*, 112 F3d 1455, 1461 (10th Cir 1997) (holding that "contract support costs" encompassed "indirect costs" incurred by a tribal organization in carrying out a self-determination contract). "Indirect costs" are defined in the ISDEAA as those "incurred for a common or joint purpose benefiting more than one contract objective." 25 USC § 450b(f). Indirect costs contrast with "direct program costs," which are those "that can be identified specifically with a particular contract objective." 25 USC § 450b(c).

tions,[5] and (2) the Reduction Clause provides that funding to one tribe need not be reduced to make funding available for another tribe.[6]

The ISDEAA and its underlying policy of self-determination replaced the policy of termination that was implemented in the 1950s.[7] Before the 1950s, the federal government controlled the planning and administration of all programs intended to benefit Native Americans, without any Native American involvement.[8] The goal of termination was to assimilate Native American people into American culture, taking away their tribal independence and cultural identity.[9] The ISDEAA, however, aims to cultivate independence and leadership within the Native American tribal communities.[10]

Courts applying and interpreting the ISDEAA have split over how far to push the federal government's obligation to provide contract support costs to Native American tribes that have entered into self-determination contracts. A simple hypothetical illustrates the problem. Assume that the Cherokee tribe contracted in 1996 with the federal government to build an alcohol abuse center, for a contract cost of $2, for use by the Cherokee's members. Assume that the amount appropriated for Indian self-determination in total for 1996 was $10 for self-determination contracts and $100 for contract support costs.[11] The Cherokee tribe then demands from the federal government, in addition to $2 in contract costs, $90 in contract support costs, an amount representing 90 percent of the total amount appropriated for contract support costs for all self-determination contracts entered into in 1996. In addition to contracting with the Cherokee tribe, assume that the government also contracted with three other tribes—the Apache, Iroquois, and Seminole—in separate self-determination contracts identical to the one entered into with the Cherokee tribe. Each of these tribes, like the Cherokee, demands in addition to the $2 in contract costs, contract support costs of $90. The total amount ap-

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5 25 USC § 450j-1(b) ("Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations.").

6 Id ("[T]he Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe.").

7 Consider Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 Stan L Rev 1181, 1181, 1196–97 (1983) (noting that although "the Indian Self-Determination Act . . . purport[s] to repudiate the termination policy," elements of the termination policy remain in effect); Richard Trudell, *Indian Tribes as Sovereign Governments* Part I at 24–25 (American Indian Resource Institute 1988).

8 See Walch, Note, 35 Stan L Rev at 1181–84 (cited in note 7).

9 See id at 1184–85, 1188–90.

10 See 25 USC §§ 450(a), 450a(a) (restating the congressional statement of findings and statement of policy behind the ISDEAA).

11 The amounts used in this hypothetical are deflated significantly, for simplicity, and do not represent the actual amounts appropriated for Indian self-determination. The actual amounts will be discussed in Part III.

propriated for contract support costs, $100, falls $260 short of the total amount demanded by Native American tribes, which is $360.

The Federal Circuit, in *Thompson v Cherokee Nation of Oklahoma*[12] (*Thompson II*), held that the ISDEAA requires the government to provide Native American tribes with the full amount of contract support costs, or $360 in the simple illustration above.[13] By contrast, the Tenth Circuit, in *Cherokee Nation of Oklahoma v Thompson*[14] (*Thompson I*), and the Ninth Circuit, in *Shoshone-Bannock Tribes of the Fort Hall Reservation v Department of Health and Human Services*,[15] held that the ISDEAA does not require the government to provide Native American tribes with the full amount of contract support costs if the provision of such amount exceeds the amount appropriated for contract support costs in the applicable appropriation act.[16] The Ninth and Tenth Circuits held that demands in excess of the amount appropriated for contract support costs would be met on a first-come, first-serve basis, in accordance with the procedure prescribed by the ISDEAA itself. In the hypothetical above, if the Cherokee tribe requests money first, it would receive the full $90, leaving only $10 available to the other tribes.

This split between the Ninth, Tenth, and Federal Circuits has two distinct layers. The ISDEAA operates through two pieces of legislation: an authorizing act and an appropriation act.[17] The authorizing act is the ISDEAA itself.[18] However, the ISDEAA requires an appropriation act to effect the actual disbursement of money to Native American tribes with whom the federal government contracts.[19] The first layer of the split centers on a disagreement about the language in an appropriation act, while the second layer of the split centers on rival interpretations of the ISDEAA itself.

The first layer of the circuit split involves the meaning of the phrase "shall remain available until expended" when that phrase appears in an appropriation act authorized by the ISDEAA. The Federal

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12 334 F3d 1075 (Fed Cir 2003).

13 Id at 1087–94.

14 311 F3d 1054 (10th Cir 2002).

15 279 F3d 660 (9th Cir 2002).

16 *Thompson I*, 311 F3d at 1060–65; *Shoshone-Bannock*, 279 F3d at 665–67 (both finding that the language of the ISDEAA would have required full funding only if sufficient funds had been appropriated, and that such funds had not in fact been appropriated).

17 See General Accounting Office, 1 *Principles of Federal Appropriations Law* 2-33 (GAO 2d ed 1991), online at http://www.gao.gov/special.pubs/og91005.pdf (visited Sept 5, 2004). Effective July 7, 2004, the General Accounting Office changed its name to the Government Accountability Office as part of the GAO Human Capital Reform Act of 2004, Pub L 108-271, 118 Stat 811. For the sake of consistency with older sources that are cited below, this Comment refers to the agency under its old name.

18 25 USC § 450j-1(b).

19 Id.

Circuit in *Thompson II* held that this phrase did not constitute a statutory cap or a limit on funding of contract support costs; therefore it did not excuse the federal government from providing the full amount of contract support costs to Native American tribes who were parties to self-determination contracts governed by the appropriation act containing that phrase.[20] The Ninth and Tenth Circuits, in contrast, held that "shall remain available until expended" did constitute a statutory cap in an appropriation act authorized by the ISDEAA.[21] The courts concluded that the statute excuses the federal government from providing contract support costs to Native American tribes in excess of the amount appropriated.

In the second layer of this circuit split, courts have disagreed about how to interpret the ISDEAA, the authorizing act, in conjunction with the "shall remain available until expended" language found in the appropriation bills. This phrase speaks directly to § 450j-1(b) of the ISDEAA, which excuses the federal government from providing funds under two circumstances: when appropriations are not available, or when funding fully would reduce funding for other tribes' contract support costs. Thus, the collateral effect of the holdings in the first layer of the split is to create another related layer of disagreement between the Federal Circuit and the Ninth and Tenth Circuits on how to interpret the ISDEAA itself. By refusing to recognize a limit on the amount of funding that the government must provide, the Federal Circuit effectively held that § 450j-1(b) is inconsistent with the rest of the ISDEAA,[22] whereas the Ninth and Tenth Circuits held that § 450j-1(b) limits the government's obligations under the ISDEAA.[23]

This Comment argues that the position articulated by the Ninth and Tenth Circuits is the preferable resolution to both layers of the split. The purpose of the entire statutory scheme and the plain text of the statute dictate that § 450j-1(b) should be read as consistent with the rest of the ISDEAA provisions. Part I sets forth the purpose underlying the ISDEAA by explaining the difference in the relationship between the federal government and Native American tribes before and after the ISDEAA. Part II explains how the ISDEAA operates as an authorization act in conjunction with appropriation acts that it has

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20 *Thompson II*, 334 F3d at 1089–90 ("[T]he 'shall remain available' language ... certainly did not constitute a statutory cap excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b).").

21 *Thompson I*, 311 F3d at 1064–65 (stating that "a better reading of the ['shall remain available'] language is that Congress intended to limit the amount available for new or expanded [contract support costs]"); *Shoshone-Bannock*, 279 F3d at 666–67 (holding that the "subject to availability" language was clear and unambiguous in its limiting of funds to those made available by the relevant appropriation act).

22 *Thompson II*, 334 F3d 1075.

23 *Shoshone-Bannock*, 279 F3d at 667; *Thompson I*, 311 F3d at 1065–66.

authorized. Part III discusses both layers of the split: first, the effect of specific appropriation act language, and second, the proper interpretation of the ISDEAA's limitation clauses in § 450j-1(b). Finally, Part IV draws upon the purpose and operation of the ISDEAA to argue that § 450j-1(b) excuses the federal government from providing contract support costs in excess of an amount indicated in an appropriation act.

I. THE PURPOSE BEHIND THE ISDEAA

To understand how the ISDEAA operates, the backdrop against which it was enacted deserves consideration. The ISDEAA was enacted to improve the relationship between the federal government and Native American tribes.[24] Before the ISDEAA, the federal government assumed the role of guardian of Native American tribes.[25] This role involved repeated efforts to assimilate Native Americans into American culture, first by heavily supervising tribes,[26] and later by instituting the "termination policy."[27] The loss of tribal status disrupted the Native American community enormously: unemployment levels rose sharply, education levels declined, and many Native Americans became welfare recipients and lost their homes.[28] Through the termina-

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24 See Trudell, *Indian Tribes as Sovereign Governments* Part I at 14–15 (cited in note 7) (discussing the legislative action taken by Congress during the 1960s through the 1980s, including the ISDEAA).

25 See Walch, Note, 35 Stan L Rev at 1181–84 (cited in note 7).

26 For example, the General Allotment Act of 1887, ch 119, 24 Stat 388 (1887), codified at 25 USC § 331 et seq (1996), repealed by Pub L No 106-462, 114 Stat 2007 (2000), called for allotments, usually of 160 acres, to be given to individual Indians, thereby ending tribal holdings of land, and also called for the sale to non-Indians of reservation land not allotted to Indians. Congress believed that governing allotments of land in this way would expedite the process of Indian assimilation. See Walch, Note, 35 Stan L Rev at 1182–83 n 10. Indian assimilation remained a goal in 1934, when the Indian Reorganization Act (IRA) was enacted. See Indian Reorganization Act, Pub L No 73-383, 48 Stat 984 (1934), codified at 25 USC §§ 461–79 (2000). Among other provisions, the IRA halted sales of reservation land to non-Indians and offered economic incentives for developing reservation resources. See Walch, Note, 35 Stan L Rev at 1183, citing 25 USC §§ 464–66, 469–70. The purpose of the IRA was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v Jones*, 411 US 145, 152 (1973), quoting Readjustment of Indian Affairs, HR Rep No 1804, 73d Cong, 2d Sess 6 (1934). Indian tribal governments were still heavily controlled by non-Indians under the IRA since the Secretary of the Interior retained approval over tribal constitutions, bylaws, and corporations. See 25 USC §§ 476(d), 477.

27 On August 1, 1953, Congress adopted House Concurrent Resolution 108, which "declared it to be the policy of the United States to abolish federal supervision over the tribes as soon as possible and to subject the Indians to the same laws, privileges, and responsibilities as other citizens of the United States." HR Con Res 108, 67 Stat B132 (Aug 1, 1953). This policy aroused strong Indian opposition. See Francis Paul Prucha, ed, *Documents of United States Indian Policy*, Document 147 at 234 (Nebraska 2000). House Concurrent Resolution 108 declared that "at the earliest possible time, all of the Indian tribes and the individual members thereof... should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." HR Con Res 108, 67 Stat at B132.

28 See Walch, Note, 35 Stan L Rev at 1189–90.

tion policy, the federal government acted as a trustee for Native American tribes.[29] The federal government planned and built programs for Native American tribes, such as hospitals, schools, and community centers.[30] After the building of a program was completed, the federal government relinquished its control of the program.[31] After the forced termination of the trusteeship between the federal government and the Native American tribe, the Native American tribe assumed responsibility for the program's operation and maintenance.[32]

President Richard Nixon's Message on Indian Affairs to Congress, delivered on July 8, 1970, addressed the state of Indian relations and voiced his adamant opposition to the policy of termination and its harmful consequences.[33] President Nixon's message is thought to have spearheaded the enactment of the ISDEAA.[34] Nixon argued that the system of forced termination was deeply flawed, because under that system Native American tribe beneficiaries were subject to the whim of the federal government, who could "discontinue [its] responsibility on a unilateral basis whenever it [saw] fit."[35] Moreover, forced termination produced "considerable disorientation" among Native American tribe beneficiaries, to the extent that these tribes could not "relate to" the assistance efforts made on their behalf.[36] A better system, Nixon urged, would eradicate that "suffocating pattern of paternalism" by channeling funds to Native American tribes to create and operate their own community-building programs.[37] Nixon recommended that Congress effectuate a policy of "self-determination without termination," a policy that would foster a strong "sense of autonomy" along with a strong "sense of community" for Native American tribes.[38]

Just a few years after Nixon's speech, Congress drafted the original version of the ISDEAA. Congress designed the first iteration of the statute to assist Native Americans in becoming active participants,

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29 See Richard Nixon, *Special Message to the Congress on Indian Affairs*, in *Public Papers of the Presidents of the United States: Richard Nixon 1970* 564, 565–66 (GPO 1971).

30 See id at 567 ("[T]he United States Government would continue to carry out its treaty and trusteeship obligations to [the Indian tribes] as long as the groups themselves believed that such a policy was necessary or desirable.").

31 See id at 567–68.

32 See id at 567.

33 See id at 564–76.

34 See S. Bobo Dean and Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 Tulsa L J 349, 349 (2000) ("The federal policy of Indian tribal self-determination . . . was initiated by President Richard Nixon in his Message on Indian Affairs to Congress in 1970 and implemented through the enactment of the [ISDEAA].") (internal citation omitted).

35 Nixon, *Special Message* at 565 (cited in note 29).

36 Id at 566.

37 Id at 567–68.

38 Id at 564–67.

rather than passive recipients, in the various federal programs operated for the exclusive benefit of Native Americans.[39] The need "for [Native Americans] to exercise greater control over Federal programs and efforts conducted for their exclusive benefit" was recognized in enacting the ISDEAA. So too was the need to develop "management and professional skills required for [Native Americans] to enter into immediate contracts . . . for the control and management of their various programs."[40] Subsequent amendments strengthened the leverage of tribes to exercise self-determination rights through the provision of contract support costs, which are the transaction costs a Native American tribe would encounter when carrying out a self-determination contract under the ISDEAA.[41]

II. OPERATION OF THE ISDEAA

As with most statutes that involve federal funding, the ISDEAA operates through two pieces of legislation: an appropriation authorization act and an appropriation act. Appropriation authorization legislation authorizes the appropriation of funds to implement the function of an agency.[42] Generally, an agency's appropriation authorization legislation does not give the agency any actual money to spend.[43] An authorization act is "basically a directive to the Congress itself which Congress is free to follow or alter (up or down) in the subsequent appropriation act."[44]

An appropriation is defined as "[a] legislative body's act of setting aside a sum of money for a public purpose."[45] However, the ap-

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39 See Indian Self-Determination Act of 1972, S Rep No 92-1001, 92nd Cong, 2d Sess 2.

40 Id.

41 See Dean and Webster, 36 Tulsa L J at 350 (cited in note 34). As amended in 1988, the ISDEAA includes a provision mandating the addition of contract support costs to the amount that the Secretary was required to provide to fund self-determination contracts. See ISDEAA Amendments of 1988, Pub L No 100-42, 102 Stat 2285, codified at 25 USC § 450j-1(a)(2) ("There shall be added to the amount required by [the contract itself] contract support costs."). This version of the ISDEAA also contained a clause which stated that the contracting Secretary "shall include in annual budget requests to the Congress a request for the funds necessary to provide contract support costs," subjecting the provision of contract support costs on the Congress's response to the Secretary's request for appropriations. See Amending the Indian Self-Determination Act of 1974, and for Other Purposes, HR Rep No 99-761, 99th Cong, 2d Sess 3 (1986). Indian tribes' rights to receive contract support costs have expanded steadily since the provision for them was made in 1988. In 1994, the contract support costs provision was amended further to provide for the recovery of contract support funding as a "direct cost," so long as recommended by the Inspector General of the Department of the Interior. See Dean and Webster, 36 Tulsa L J at 362.

42 See General Accounting Office, 1 *Principles of Federal Appropriations Law* at 2-33 (cited in note 17).

43 Id.

44 Id at 2-35.

45 *Black's Law Dictionary* 98 (West 7th ed 1999).

propriation depends upon separate legislation to define the specific public purpose for which it will be spent. "Generally, an appropriation is thought of as the specification of an amount of money for a federal agency or activity, while the range of actions on which the money may be spent is defined in other legislation."[46] Only Congress is authorized to make an appropriation. The Constitution states: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[47] Moreover, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[48] Thus, every federal agency is dependent upon Congress for its funding.[49]

The ISDEAA contains provisions that govern the general expenditure of money toward Native American programming, but it does not specify a particular amount to be expended. An appropriation act governs only for a specified period of time, typically one year,[50] and applies to all contracts entered into pursuant to the ISDEAA for that period of time. Thus, the ISDEAA and a series of appropriation acts operate in tandem to achieve the transfer of money from the Treasury to Native American tribes.

This Part explains in detail the operation of the ISDEAA (which is an appropriation authorization act), of appropriations law generally, and of the specific appropriation acts authorized by the ISDEAA.

A. The ISDEAA: An Appropriation Authorization Act

The ISDEAA directs the Secretary of the Interior or the Secretary of Health and Human Services (either of them, the "Secretary") to enter into contracts for the operation of Native American programs with any Native American tribe that requests to enter into such a contract.[51] A Native American tribe is defined as "any Indian tribe, band, nation, or other organized group or community . . . [whose members are] recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[52]

These contracts between the Secretary and Native American tribes are called "self-determination contracts."[53] Self-determination

46 Kate Stith, *Congress' Power of the Purse*, 97 Yale L J 1343, 1352 (1988).

47 US Const Art I, § 9, cl 7.

48 *Cincinnati Soap Co v United States*, 301 US 308, 321 (1937).

49 See General Accounting Office, 1 *Principles of Federal Appropriations Law* at 1-3 (cited in note 17) ("[A] federal agency may not make a payment from the United States Treasury unless Congress has made the funds available.").

50 See id at 2-11.

51 See 25 USC § 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts.").

52 25 USC § 450b(e).

53 25 USC § 450b(j).

contracts provide for "the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law."[54] Prior to the enactment of the ISDEAA, federal law required the federal government to plan, conduct, and administer programs and services for Native American tribes. The advent of self-determination contracts permitted tribes to take control of those programs and services.

The programs and services that a self-determination contract may cover include "hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs."[55] Under this arrangement, the Secretary would fund the projects, but the projects would be planned, conducted, and administered by the Native American tribe.[56]

The amount of funding provided for self-determination contracts, commonly referred to as the "secretarial amount,"[57] cannot be less than the Secretary "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract."[58] In addition to the secretarial amount, the Secretary must provide "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract."[59] Thus, contract support costs represent the transaction costs incurred by a Native American tribe endeavoring to build and manage its own program, rather than the government doing the same.

Retraction or modification of the amount of funding promised through a self-determination contract is explicitly provided for by § 450j-1(b) of the ISDEAA. This provision allows the Secretary to alter the amount in either of two scenarios corresponding to the Availability and Reduction Clauses that compose § 450j-1(b): (1) if funding is unavailable, or (2) if providing funding for one self-determination contract with one Native American tribe would necessitate the reduction of funds for another self-determination contract with another Native American tribe.[60] The Availability Clause provides: "Notwithstanding any other provision in this subchapter, the provision of funds un-

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54 Id.

55 *Thompson II*, 334 F3d at 1081.

56 See 25 USC § 450j.

57 See *Thompson I*, 311 F3d at 1056; *Ramah Navajo School Board, Inc v Babbitt*, 87 F3d 1338, 1341 (DC Cir 1996) (describing the secretarial amount as the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe").

58 25 USC § 450j-1(a)(1).

59 25 USC § 450j-1(a)(2).

60 See 25 USC § 450j-1(b).

der this subchapter is subject to the availability of appropriations."[61] The Reduction Clause provides: "[T]he 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."[62]

Every self-determination contract entered into under the ISDEAA must either contain or incorporate by reference the provisions of a model agreement prescribed by the ISDEAA, as set forth in § 450l(a). A model agreement contains a reiteration of the Availability Clause, specifically stating that the amount provided by the Secretary is "subject to the availability of appropriations."[63]

B. Appropriation Acts Generally

The two exceptions to funding for self-determination contained in § 450j-1(b), the Availability and Reduction Clauses, have been applied where a Native American tribe has demanded funding from the Secretary, in addition to the amount contracted for, to pay for contract support costs such as overhead expenses resulting from managing a health care program that the tribe took over from the government pursuant to a self-determination contract.[64] Such claimed overhead expenses have, in the past, exceeded the amount appropriated for contract support costs in the fiscal year the self-determination contract was to be performed.[65]

The General Accounting Office[66] (GAO) publishes *Principles of Federal Appropriations Law*,[67] which, though not binding on courts,[68] compiles expert opinions on which many courts (including the U.S. Supreme Court and the Federal Circuit) have explicitly relied.[69] The

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61 Id.

62 Id.

63 25 USC § 450l(c) (describing § 1(b)(4) of the model agreement).

64 These were the contract support costs demanded in *Shoshone-Bannock*. See 279 F3d at 663.

65 This situation occurred in the cases most relevant to this Comment: *Thompson II*, 334 F3d at 1081–82 (addressing a claim that the government improperly failed to pay a tribe's overhead costs of running health programs as per a self-determination contract); *Thompson I*, 311 F3d at 1058–59 (addressing a claim for contract costs for new and expanded contracts, as well as ongoing contracts, that the government had not paid due to "budget shortfalls"); *Shoshone-Bannock*, 279 F3d at 663–64 (addressing a claim for overhead costs of a health care program that was insufficiently funded by appropriations for the 1996 fiscal year). The difference between initial and expanded contracts and ongoing contracts will be explained in Part II.C.

66 The General Accounting Office is now referred to as the Government Accountability Office. See note 17.

67 General Accounting Office, *Principles of Federal Appropriations Law* (cited in note 17).

68 See *Thompson II*, 334 F3d at 1084 (stating that, while "[the opinions of the GAO] are not binding," they are expert opinions that should be carefully considered).

69 See, for example, *Lincoln v Vigil*, 508 US 182, 192 (1993) (relying on the GAO's *Principles of Federal Appropriations Law* in stating that "the very point of a lump-sum appropriation is

GAO, an independent agency,[70] is headed by the Comptroller General.[71] The Comptroller General has the authority to "prescribe regulations to carry out" her "duties and powers,"[72] which include the investigation "of all matters related to the receipt, disbursement, and use of public money"[73] and the analysis of the "expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently."[74]

Over the years, certain forms of appropriation language have become standard.[75] Such standard language has particular significance to Congress's desire to "earmark," or specifically designate part of a general appropriation for a particular object. The upper limit of an amount earmarked in an appropriation act is called a statutory cap.[76]

Statutory caps indicate to agencies that Congress has appropriated limited dollars for the agency to spend on a particular program. The Anti-Deficiency Act[77] makes it unlawful for "an officer or employee of the United States Government ... [to] make or authorize an expenditure or obligation exceeding an amount available in an appropriation."[78] In this way, the Anti-Deficiency Act prevents monetary liabilities beyond the amounts that Congress has appropriated.[79] Violation of the Anti-Deficiency Act by a government official constitutes a criminal offense,[80] reinforcing the importance of clarity in appropriations limitations.

The GAO has stated that "the most effective way to establish a maximum . . . earmark is by the words 'not to exceed' or 'not more than.' ... These are all phrases with well-settled plain meanings."[81] Less

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to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way"). See also *Thompson II*, 334 F3d at 1084–86 (noting that the "fundamental principles of appropriations law" espoused by the Supreme Court are drawn from, among other sources, the GAO's *Principles of Federal Appropriations Law*).

70 See 31 USC § 702(a) (2000) ("The General Accounting Office is an instrumentality of the United States Government independent of the executive departments.").

71 See 31 USC § 702(b).

72 31 USC § 711(1).

73 31 USC § 712(1).

74 31 USC § 712(3).

75 See General Accounting Office, 2 *Principles of Federal Appropriations Law* 6-4 (GAO 2d ed 1991), online at http://www.gao.gov/special.pubs/og91005.pdf (visited Sept 5, 2004).

76 See id.

77 Pub L No 97-258, 96 Stat 923 (1982), codified at 31 USC § 1341(a) (2000).

78 31 USC § 1341(a)(1).

79 See Stith, 98 Yale L J at 1371 (cited in note 46).

80 See 31 USC § 1350 (providing that a violation of § 1341(a) can be penalized by a fine of up to $5,000 and/or imprisonment for up to two years).

81 General Accounting Office, 2 *Principles of Federal Appropriations Law* at 6-8 (cited in note 75).

clear in meaning and less predictable in its function as part of an appropriation bill in which it appears, the phrase "shall be available" does less work when used without the "not to exceed" or "not less than" modifiers.[82] "Shall be available" and "shall remain available" are synonymous phrases.[83] The ambiguous "shall remain available" phrase is therefore contingent upon words surrounding it in an appropriation act, and for this reason it cannot be interpreted on its own to set a minimum or maximum limit on funding, according to the GAO.[84] "Shall remain available," without limiting words like "not less than," may not achieve a level of clarity that effectively prescribes limits in excess of which an agency official cannot spend. The language may not prevent the agency official from risking criminal liability pursuant to the Anti-Deficiency Act.[85]

According to the Comptroller General, "When the Congress expressly provides that an appropriation 'shall remain available until expended,' it constitutes [an appropriation without temporal limits] and all statutory limits on *when* the funds may be obligated and expended are removed."[86] Thus, the phrase "shall remain available until expended" does not impose temporal statutory limits in the ordinary sense; the availability of the funds is not limited to any specific period of time. However, the plain language clearly supports some limitation on funding once funds that "shall remain available" have been "expended."

C. Appropriation Acts under the ISDEAA

The ISDEAA provides that the Secretary will fund self-determination contracts by providing the secretarial amount[87] in addition to an amount designated for contract support costs,[88] as has been explained above.[89] This amount is authorized by the ISDEAA, but actually disbursed to Native American tribes through appropriation acts

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82 See id at 6-6 to 6-7.

83 See id at 5-3 (noting that "shall remain available" and "shall be available" are both rendered meaningless absent express indication in the appropriation itself that the amount available is not to exceed a specified amount).

84 See id at 6-6 to 6-8.

85 See 31 USC § 1350.

86 *Matter of: The Honorable Thad Cochran*, 1996 WL 290140, *1 (Comp Gen) (administrative report) (emphasis added).

87 See 25 USC § 450j-1(a)(1) ("The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided.").

88 See 25 USC § 450j-1(a)(2) ("There shall be added to the [secretarial amount] contract support costs.").

89 See Part II.A.

that designate specific amounts of money to fund Native American programming for a specific period of time, typically one year.[90]

Numerous provisions of the ISDEAA make clear that the ISDEAA defers to appropriation acts. For example, the ISDEAA provides that the terms of a self-determination contract "shall be subject to the availability of appropriations."[91] Pursuant to the Reduction Clause, funds provided for self-determination contracts can be reduced if there has been a "reduction in appropriations from the previous fiscal year for the program or function to be contracted."[92] In the Availability Clause, the ISDEAA provides:

> 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.[93]

An appropriation act authorized by the ISDEAA designates funding for "initial or expanded" and "ongoing" self-determination contracts.[94] An initial or expanded self-determination contract is a self-determination contract that began during the fiscal year of the relevant appropriation act.[95] An ongoing self-determination contract is a self-determination contract that continued from fiscal years before the relevant appropriation act.[96]

Initial and expanded self-determination contracts are funded in appropriation acts through the line item for the Indian Self-Determination Fund. The Indian Self-Determination Fund was established in fiscal year 1988 to designate specific funds for the additional contract support costs that result when tribes contract for initial and expanded self-determination contracts.[97]

Appropriation acts authorized by the ISDEAA designate money specifically to fund contract support costs.[98] Thus, contract support

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90 See General Accounting Office, 1 *Principles of Federal Appropriations Law* at 2-33, 5-2 (cited in note 17).

91 25 USC § 450j(c)(1).

92 25 USC § 450j-1(b)(2)(A).

93 25 USC § 450j-1(b).

94 See, for example, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub L No 104-134, 110 Stat 1321, 1321-170.

95 See *Thompson II*, 334 F3d at 1087.

96 See id.

97 See Continuing Appropriations, Fiscal Year 1988, Pub L No 100-202, 101 Stat 1329, 1329-245 (1987) (earmarking $2.5 million "for the establishment of an Indian Self-Determination Fund").

98 See Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat at 1321-170, which provides that the Bureau of Indian Affairs receive $1,384,434,000 for the con-

costs incurred by Native American tribes in carrying out self-determination contracts are to be funded from the amount appropriated specifically for the contract support costs line-item.

In recognition of the fact that numerous tribes would compete for funding, the ISDEAA provides that "payments of any grants or under any contracts pursuant to [the ISDEAA] ... may be made ... in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this [Act]."[99] In order to manage these competing requests, the Indian Health Service established a priority list based on the date the tribe requested funding for a self-determination contract.[100] Those tribes at the top of the priority list would be fully funded until the funding for contract support costs was depleted, while those at the bottom of the priority list would remain on the list of contracts to be funded the following year.[101] Tribes that were not funded in full for contract support costs because their priority was low have filed suit to demand full funding, forcing courts to wrestle with the task of interpreting and applying the ISDEAA.

III. Divisive Interpretation of the ISDEAA

The interpretation and application of the ISDEAA has generated disagreement among circuit courts. Because the ISDEAA and the appropriation acts authorized by the ISDEAA operate in tandem to provide Native American tribes with the opportunity for self-determination,[102] two issues divide the courts, creating a two-layered split. The first layer concerns the language in appropriation acts authorized by the ISDEAA—"shall remain available until expended." As has been shown, the ISDEAA operates by reference to an author-

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struction, repair, and improvement of Indian housing:

> [O]f which not to exceed $100,255,000 shall be for welfare assistance grants and not to exceed $104,626,000 shall be for payments to tribes and tribal organizations *for contract support costs* associated with ongoing contracts or grants or compacts entered into with the Bureau of Indian Affairs prior to fiscal year 1996, as authorized by the Indian Self-Determination Act of 1975, as amended, and up to $5,000,000 shall be for the Indian Self-Determination Fund, which shall be available for the transitional cost of initial or expanded tribal contracts, grants, compacts, or cooperative agreements with the Bureau of Indian Affairs under the provisions of the Indian Self-Determination Act.

Id (emphasis added).

99 25 USC § 450j(b).

100 See *Thompson I*, 311 F3d at 1058.

101 See id:

> Each year [Indian Health Services] would fully pay for [contract support costs] for new or expanded contracts at the top of the priority list, and continue down the list until [funds were] fully depleted. Contracts that had been so funded were removed from the list, and those below [them] advanced.

102 See 25 USC § 450j-1(b) ("[T]he provision of funds under this Act is subject to the availability of appropriations.").

ized appropriation act.[103] Thus, the disagreement among courts regarding the "shall remain available until expended" language in an ISDEAA authorized appropriation act triggers a second layer of division among the circuits regarding the language of the ISDEAA's Availability Clause.

This Part examines how the Federal Circuit departed from the approach taken by the Ninth and Tenth Circuits in responding to demands by Native American tribes for money exceeding the amount specified in an appropriation act. First, this Part sets forth the disagreement on the meaning of the phrase found in the appropriation act—"shall remain available until expended." Second, this Part will explain exactly how the Federal Circuit disagrees with the Ninth and Tenth Circuits concerning the ISDEAA itself.

A. The Appropriation Act Language Split

The first disagreement between the Federal Circuit and the Ninth and Tenth Circuits involves the words, "shall remain available until expended," which appeared in an appropriation act authorized by the ISDEAA.[104]

1. Separating "shall remain available" from "until expended": the Federal Circuit's view.

In *Thompson II*, the Cherokee Nation of Oklahoma had entered into self-determination contracts with the Secretary of Health and Human Services to operate "hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs," all formerly operated by the Secretary.[105] The Cherokee Nation brought a claim against the Secretary for nonpayment of the full amount of contract support costs.[106]

The relevant appropriation act provided, in its appropriation of funds for Indian Health Services,[107] that "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs

[103] See Part II.C.

[104] See Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat at 1321-189.

[105] *Thompson II*, 334 F3d at 1081.

[106] See id at 1082 ("[The Cherokee Nation alleged] that the Secretary had not paid the full indirect costs to which it was entitled.").

[107] Indian Health Services is an arm of the Department of Health and Human Services. Thus, when the ISDEAA directs the Secretary of Health and Human Services to enter into self-determination contracts with Indian tribes, this governs Indian Health Services as well. See 25 USC §§ 450b(i), 450f(a)(1).

of initial or expanded tribal contracts."[108] The Federal Circuit held that because there were no statutory caps in the appropriation act that governed the self-determination contract between the Cherokee Nation of Oklahoma and the Secretary, the Secretary could not refuse to pay the contract support costs demanded, which totaled $7,040,358.52. This amount did not exceed the total funds appropriated. Nevertheless, appropriation of this amount would usually trigger the Reduction Clause of § 450j-1(b), because fulfilling the Cherokee Nation's request would leave only $459,641.48 in funding for contract support costs for all other self-determination contracts governed by the same appropriation act, requiring a reduction of funds for programs serving other tribes.[109]

The Federal Circuit held that "shall remain available" was clearly not a statutory cap but instead was an unambiguous "carryover provision." A carryover provision is an allowance for funding to be used in the following fiscal year from the fiscal year of the appropriation act in which the carryover provision appears.[110] If "$7,500,000 shall remain available" signified a carryover provision, then $7,500,000 would have been available for the same purpose (the funding of contract support costs) during the year that the appropriation act applied and the year after. Whereas if "$7,500,000 shall remain available" refers to a statutory cap, as the Ninth Circuit held in *Shoshone-Bannock* and the Tenth Circuit held in *Thompson I*, then once $7,500,000 was spent on contract support costs, the amount appropriated for contract support costs would no longer be available.

Because *Thompson II* involved an appropriation act that stated that funds "shall remain available" and not that funds were "not to exceed" a particular amount, the Federal Circuit reasoned that *Thompson II* should be distinguished from its earlier decision in *Babbitt v Oglala Sioux Tribal Public Safety Department*.[111] As described in Part II.B, "shall remain available" does not by itself constitute a statutory cap, a carryover provision, or any other sort of meaningful mandate.[112]

108 Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat at 1321-189.

109 See *Thompson II*, 334 F3d at 1083.

110 See id at 1090 ("The phrase 'shall remain available' . . . [has been] consistently interpreted, not as a statutory cap on funding . . . but as an authorization of 'carry over authority,' indicating that unexpended funds 'shall remain available' for the same purpose during the succeeding fiscal year.").

111 194 F3d 1374, 1378–80 (Fed Cir 1999). *Thompson II* noted that the applicable appropriation act in *Oglala Sioux* contained explicitly restrictive language, namely the phrase "not to exceed," thereby imposing a statutory cap. See *Thompson II*, 334 F3d at 1084–85. The appropriation act in *Thompson II* on the other hand used the phrase "shall remain available," which, the court reasoned, imposed no such restriction on funding. See id at 1090. Therefore, unlike the result in *Oglala Sioux*, *Thompson II* did not excuse the Secretary from providing contract support costs in excess of those appropriated. See id.

112 See General Accounting Office, 2 *Principles of Federal Appropriations Law* at 6-6 to 6-7

Furthermore, the cases upon which the Federal Circuit relied to determine that "shall remain available" was not a statutory cap involved appropriation acts in which the words "shall remain available" were surrounded by more significant language that indicated the phrase was meant to be a carryover provision.[113] Therefore, the Federal Circuit could not have meant that "shall remain available" had a clear meaning when this phrase appeared in an appropriation act absent explanatory language.

2. "Shall remain available until expended": the Ninth and Tenth Circuits' view.

In holding that "shall remain available" constituted an unambiguous carryover provision and not a statutory cap, the Federal Circuit explicitly rejected the approaches of the Ninth and Tenth Circuits.[114] In the Federal Circuit decision in *Thompson II*, as well as in the Ninth Circuit decision in *Shoshone-Bannock* and the Tenth Circuit decision in *Thompson I*, self-determination contracts were governed by an appropriation act that stated that funding "shall remain available until expended."[115] In each case, the amount demanded in contract support costs exceeded the amount appropriated for contract support costs.

In the Ninth Circuit, for example, the Shoshone-Bannock tribe took over administration from Indian Health Services of various health care programs on the Fort Hall Reservation in Idaho and demanded money for contract support costs pursuant to a self-determination contract governed by the same appropriation act that applied in *Thompson II*.[116] Because giving the Shoshone-Bannock tribe the full amount of its requested contract support costs exceeded the amount of contract support costs appropriated for all tribes for that

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(cited in note 75) (observing that courts have followed no firm rule in interpreting the phrase "shall be available" when it appears on its own).

113 See, for example, *Massachusetts Department of Education v United States Department of Education*, 837 F2d 536, 538–39 (1st Cir 1988) (holding that a provision of the General Education Provisions Act that stated that "any funds from appropriations . . . shall remain available for obligation and expenditure by such agencies and institutions during such succeeding fiscal year" was a carryover provision obligating expenditures for the succeeding fiscal year), cited in *Thompson II*, 334 F3d at 1090. See also *Wilson v Watt*, 703 F2d 395, 400 (9th Cir 1983) (interpreting an ISDEAA-authorized appropriation act that explicitly described the funding power it was bestowing as "carryover authority" to be a carryover provision rather than a statutory cap).

114 See *Thompson II*, 334 F3d at 1090 ("We conclude that the Ninth and Tenth Circuit decisions were incorrect [in their interpretation of 'shall remain available'].").

115 See id at 1089–90; *Thompson I*, 311 F3d at 1059; *Shoshone-Bannock*, 279 F3d at 665. All three cases refer to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat 1321.

116 See *Shoshone-Bannock*, 279 F3d at 665.

year, the court held that the full amount of contract support costs need not have been awarded, pursuant to § 450j-1(b).[117]

The Tenth Circuit concluded similarly that the Shoshone-Paiute tribe and the Cherokee Nation were not entitled to the full amount of their demands for contract support costs when such demands exceeded the amount appropriated for contract support costs.[118] Each self-determination contract entered into under the ISDEAA must either contain or incorporate by reference the provisions of a model agreement prescribed by § 450l(a) of the ISDEAA.[119] Accordingly, the self-determination contracts entered into between the Secretary and the Shoshone-Paiute and Cherokee tribes each conditioned funding on the availability of appropriated funds.[120]

The Ninth and Tenth Circuits therefore both held that "shall remain available until expended" constituted a statutory cap that excused the Secretary from providing funds in excess of the amount specified in the relevant appropriation act.[121]

B. The Split about the Role of § 450j-1(b) in the ISDEAA

The Federal Circuit departed aggressively from its sister circuits' approach in interpreting the ISDEAA. The statutory cap has one major function in the context of the ISDEAA: to trigger the Availability and Reduction Clause limitations in § 450j-1(b) of the ISDEAA.[122] As a result, the real effect of the Federal Circuit's holding that "shall remain available" was an unambiguous carryover provision[123] was to

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117 See *Shoshone-Bannock*, 279 F3d at 667.

118 See *Thompson I*, 311 F3d at 1058–59.

119 See Part II.A.

120 See *Thompson I*, 311 F3d at 1057 (noting that the Shoshone-Paiute contract provided that funding was "subject only to the appropriation of funds," and the Cherokee contract provided that "funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services").

121 See *Shoshone-Bannock*, 279 F3d at 666–67; *Thompson I*, 311 F3d at 1064–65.

122 In this way, § 450j-1(b) serves as the "lever" in Wittgenstein's *Philosophical Investigations*, which states: "'I set the brake up by connecting up rod and lever.' – Yes, given the whole of the rest of the mechanism. Only in conjunction with that is it a brake-lever, and separated from its support it is not even a lever; it may be anything, or nothing." Ludwig Wittgenstein, *Philosophical Investigations*, Part I, § 6 at 5 (Blackwell 2d ed 2000). In this cryptic passage Wittgenstein identified the common tendency to define terminology without regard for its context. Just as the "lever," when "separated from its support," its brake, or its car, "may be anything, or nothing," so too the statutory cap may be anything, or nothing, when separated from the context of § 450j-1(b) of the ISDEAA. The Federal Circuit, in arguing that the issue in *Thompson II* concerned nothing more than a disagreement about whether "shall remain available" constituted a statutory cap, attempted to disconnect lever from brake. If the Federal Circuit opinion is to be read seriously, it must be read with an eye toward its context: § 450j-1(b) of the ISDEAA.

123 See *Thompson II*, 334 F3d at 1090 ("Such language is commonly understood as a carryover provision, not a statutory cap.").

construe the ISDEAA in such a way as to preclude an avenue by which § 450j-1(b) could apply.

Two competing views emerge from the actual subject matter of the Federal Circuit's disagreement with the Ninth and Tenth Circuits. The first of these views, promoted by the Federal Circuit, is that § 450j-1(b) cannot be reconciled with the rest of the provisions in the ISDEAA and should be read out of the ISDEAA.[124] The second view, promoted by the Ninth and Tenth Circuits, was that § 450j-1(b) should be taken seriously as a restriction on the provision of funds to Native American tribes with whom the Secretary has entered into self-determination contracts, when contract support costs demanded by these Native American tribes exceed the amount appropriated for contract support costs in the relevant appropriation act.

1. The ISDEAA cannot be read consistently with § 450j-1(b).

If the reasoning of the Federal Circuit is taken seriously, § 450j-1(b) should be read out of the ISDEAA based on an argument rooted in the "purpose" of the ISDEAA and a canon of construction applicable to Native American legislation. The purpose of the ISDEAA, the proponents of this view urge, was to provide Native American tribes with leadership and independence. Such leadership and independence can only be achieved through the provision of funds. For this reason, the mandate to provide contract support costs, in addition to the secretarial amount, for self-determination contracts was added to the ISDEAA in 1988. Funding must be unlimited, according to this view, because if a Native American tribe is left without any contract support costs, that tribe will not be able to exercise its right to plan, conduct, and administer programs pursuant to its self-determination contract with the federal government.[125]

A special canon of construction instructs that federal statutes relating to Native Americans should be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.[126] This canon of construction is "rooted in the unique trust relationship between the United States and the Indians."[127] Using that canon, the Federal Circuit and its supporters plausibly argue that am-

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124 Some have urged a similar, though somewhat more aggressive, view—namely that the ISDEAA should be amended to expunge the Availability Clause. See Dean and Webster, 36 Tulsa L J at 375–76 (cited in note 34).

125 See id at 352.

126 See *Ramah Navajo Chapter v Lujan*, 112 F3d 1455, 1461 (10th Cir 1997) (holding that the liberal canon of construction in favor of Native Americans controlled over a more general rule of deference to agency interpretations).

127 *County of Oneida v Oneida Indian Nation*, 470 US 226, 247 (1985).

biguity in the language of the appropriation bill requires reading § 450j-1(b) out of the ISDEAA.

2. The ISDEAA can be read consistently with § 450j-1(b).

The alternative position is that § 450j-1(b) should be read as an operative component of the ISDEAA, especially when interpreting the ISDEAA to authorize ambiguous appropriations language such as "shall remain available," because § 450j-1(b) is an unambiguous, explicit provision of the ISDEAA. The Tenth Circuit took this position in *Thompson I*.[128] The court reasoned that awarding the full amount of contract support costs to a Native American tribe that demanded an amount exceeding that appropriated would misinterpret the ISDEAA, which conditions federal funding upon the availability of appropriations.[129] The Tenth Circuit reasoned that the language of § 450j-1(b) is "clear and unambiguous."[130] The court further noted that "[b]y means of this express language, 'Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it.'"[131] Thus the Ninth and Tenth Circuits read § 450j-1(b) of the ISDEAA to mean what it says: "the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-[contract support cost] purposes under the [ISDEAA] in order to meet his responsibility to allocate [contract support costs]."[132]

IV. RECONCILING THE PURPOSE OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT WITH § 450j-1(b)

The Federal Circuit's departure from the interpretations of the ISDEAA put forth by the Ninth and Tenth Circuits is contrary to the plain language and purpose of the ISDEAA as well as general principles of appropriations law. Therefore, in this Part, I argue that the second of the two competing views, explained in Part III.B.2, should govern the interpretation of the ISDEAA.

128 311 F3d at 1061.

129 Id ("As [§ 450j-1(b)] plainly states, the '*provision* of funds' is '*subject to* the availability of appropriations.'").

130 Id, citing *Oglala Sioux*, 194 F3d at 1378.

131 *Thompson I*, 311 F3d at 1061, quoting *Shoshone-Bannock*, 279 F3d at 665.

132 *Thompson I*, 311 F3d at 1061, quoting *Ramah Navajo School Board*, 87 F3d at 1345.

A. The Purpose of the ISDEAA Is Not Hampered by § 450j-1(b)

Proponents of the position that the ISDEAA should be read without § 450j-1(b) argue that if "shall remain available" is not a carryover provision and not a statutory cap based on its plain language alone, it is certainly intended to be a carryover provision when read against the backdrop of the history of the ISDEAA.

The ISDEAA remedied federal domination over planning, conducting, and administering Native American programming. That the ISDEAA provides for Native American tribes to spend money to do the same things that the federal government spent money to do is incidental to the essence of the ISDEAA; the ISDEAA is primarily a transfer of responsibility, not of money. Despite this fundamental goal, defenders of *Thompson II* argue that the transfer of responsibility to Native American tribes less experienced than the federal government in the arena of planning, conducting, and administering programs requires the expenditure of all transactional costs incident to the execution of self-determination contracts.[133] The ISDEAA, however, provides that funding is contingent upon the availability of funds. In this way the ISDEAA is in the company of many other similar provisions in the United States Code. Congress commonly conditions its funding upon the availability of such funding, and an exception should not be made to such a practice for Native American tribes.

Native American funding has already been treated differently from other federal funding through the amendments to the ISDEAA that provide contract support costs to Native American tribes. These contract support costs were intended to promote the feasibility of Native American tribes' exercising their responsibility to plan, conduct, and administer their own projects.[134]

Furthermore, the Reduction Clause in § 450j-1(b) does not necessarily impair the ability of Native American tribes to achieve independence and leadership. Through § 450j-1(b) and prioritized funding,[135] Native American tribes may be forced to compete for the complete funding of their contract support costs, which may in turn foster collaboration among Native American tribes and bring independence from federal subsidy. If Native American tribes are aware that only some tribes will win funding, projects among the tribes may be consolidated.

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[133] See Dean and Webster, 36 Tulsa L J at 353–55 (cited in note 34) (quoting a 1999 report by the GAO finding that "[s]hortfalls in funding for contract support have adversely affected tribes in various ways").

[134] See Part I.

[135] See notes 100–01 and accompanying text.

On the other hand, one could argue that the ISDEAA has successfully done away with the trusteeship between the federal government and Native American tribes.[136] The eradication of this relationship was the principal motivation driving the enactment of the ISDEAA. To the extent that the ISDEAA, along with § 450j-1(b), has successfully accomplished its intended goal,[137] no basis exists upon which to challenge Congress's inclusion of a standard availability clause. Absent a challenge to Congress's inclusion of a standard availability clause, § 450j-1(b) must be read as its inclusion in the ISDEAA plainly demands.

Congress places conditions on funding to ensure that it does not obligate itself in excess of an allowance provided for in an annual appropriation act.[138] The ISDEAA defers to appropriation acts for the actual provision of funds, and so a clause in the ISDEAA that conditions funding on appropriations is a sensible provision.

B. "Shall Remain Available" Language in an Appropriation Act Urges a Reading of the ISDEAA That Includes § 450j-1(b)

Appropriation acts that apply to self-determination contracts are authorized by the ISDEAA.[139] Often, though not always, Congress passes an authorizing act before passing the appropriation act.[140] The ISDEAA is an example of this; it was enacted before the 1996 appropriation act that was at issue in the Federal, Ninth, and Tenth Circuit decisions discussed in this Comment. The significance of an authorizing act coming before an appropriation act is that an appropriation act's language very conceivably might mirror the language of its earlier authorizing act.

Often, an appropriation act explicitly incorporates other legislation, notably substantive legislation.[141] For example, in the appropriation for ACTION, a program provided for by the Department of Labor and former Department of Health, Education, and Welfare,[142] the

136 See Dean and Webster, 36 Tulsa L J at 353–55 (cited in note 34) ("[I]mposition of such a penalty on tribes who exercise their self-determination rights is inconsistent with Congress' commitment to 'supporting . . . strong and stable tribal governments.'").

137 The ISDEAA has been described as "the most successful Indian policy [ever] adopted by the United States." Id at 350 (quoting the chairman of the Miccosukee tribe in a statement before the House Resource Committee).

138 See Stith, 97 Yale L J at 1353 (cited in note 46).

139 See 25 USC § 450j-1(b).

140 See General Accounting Office, 1 *Principles of Federal Appropriations Law* at 2-35 (cited in note 17) (stating that "the typical sequence is: (1) organic legislation, (2) authorization of appropriations, if not contained in the organic legislation, and (3) the appropriation act").

141 See Stith, 97 Yale L J at 1353.

142 See Departments of Labor, Health, Education and Welfare Appropriations Act, Pub L No 94-439, 90 Stat 1418, 1434 (1976).

appropriation act stated: "For expenses necessary for ACTION to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, $108,200,000."[143]

The phrase, "shall remain available," has little if any significance on its own.[144] The GAO suggests that modifying words are necessary to give the phrase a particular meaning.[145] The phrase "shall remain available" in an appropriation act does not signify any particular type of appropriations provision. The Federal Circuit incorrectly concluded that the phrase "shall remain available" on its own conveyed any meaning at all. Therefore, to interpret this phrase in the appropriation act authorized by the ISDEAA, more information is necessary. A better interpretation of the appropriation language would take into account the entire phrase "shall remain available *until expended*." The "until expended" language indicates that funding should remain available until expended. Of course, then, once the funding was expended, the funding would cease to remain available.

Looking to the overall structure of the funding scheme for Native American tribes may provide some context. The phrase "shall remain available" in the appropriation act is nearly identical to a similar phrase in § 450j-1(b) in the ISDEAA.

The Availability Clause of § 450j-1(b) states that funding is contingent on the fact that funds to expend remain in an annual appropriation. "Shall remain available until expended" means that funds can be granted until those funds have been spent. The similarity between the two provisions is unsurprising in light of the contingency of the phrase, "shall remain available," and in light of the fact that the 1996 appropriation act was authorized by the ISDEAA. Under this interpretation of "shall remain available until expended," this phrase promotes a reading of the ISDEAA that includes § 450j-1(b), because its Availability Clause was directly reflected in the appropriation act authorized by the ISDEAA.

C. The Federal Circuit's Holding in *Thompson II* Conflicts with General Principles of Appropriations Law

In *Thompson II*, the Federal Circuit endorsed a reading of the ISDEAA that is inconsistent with the general principles of appropriations law set forth by the GAO. Yet, the Federal Circuit employed these same principles in establishing six less controversial propositions

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143 Id.

144 See Part II.B.

145 See General Accounting Office, 2 *Principles of Federal Appropriations Law* at 6-6, 6-7 (cited in note 75) (noting that whether "shall be available" is used in conjunction with phrases such as "not to exceed" or "not less than" is an important factor in interpreting congressional appropriations).

in *Thompson II*, such as the proposition that "Congress generally uses standard phrases to impose a statutory cap."[146] While the GAO's interpretation certainly is not binding authority on the Federal Circuit or any other court, it seems odd for the Federal Circuit to disregard the GAO principles when it has referred to them in the past as "expert opinion[s], which we should prudently consider."[147] Contrary to the Federal Circuit's view, the GAO explains that "shall remain available" has little, if any, interpretive value on its own, and is not clearly a carryover provision or a statutory cap.[148]

Ultimately, the appropriation act language in *Thompson II* was not materially different from the appropriation act language in *Oglala Sioux*, where the appropriation act itself contained the words "not to exceed."[149] "Shall remain available" is not as clearly a statutory cap as is "not to exceed," but the Federal Circuit did not convincingly distinguish between the two phrases such that a departure from the Federal Circuit's prior holding and from the Ninth and Tenth Circuit approaches was warranted.

CONCLUSION

The ISDEAA must be read consistent with its plain language. That plain language includes § 450j-1(b) as a condition to the funding of self-determination contracts. To draft exceptions to funding into a statute is Congress's right, and it is outside the province of the courts to construe a statute like the ISDEAA in a manner clearly inconsistent with the plain meaning of the statute. The effectuation of the purpose of the ISDEAA is not hindered by § 450j-1(b) because the purpose of the ISDEAA is the eradication of the federal government's dominance over Native American programming and the entrustment of that responsibility in the hands of Native American tribes. Because the plain language and purpose of the ISDEAA do not require any departure from longstanding principles of appropriations law, § 450j-1(b) must be treated with the same deference as every other provision of the ISDEAA.

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146 *Thompson II*, 334 F3d at 1084, citing General Accounting Office, 2 *Principles of Federal Appropriations Law* at 6-4 (cited in note 75).

147 *Thompson II*, 334 F3d at 1084, citing *Delta Data Systems Corp v Webster*, 744 F2d 197, 201 (DC Cir 1984).

148 See General Accounting Office, 2 *Principles of Federal Appropriations Law* at 6-6, 6-7 (noting that if "shall be available" is used on its own, the rules regarding its interpretation are unclear).

149 See 194 F3d at 1376 (observing that the appropriation act at issue appropriated $1.5 billion for Native American programs "of which not to exceed $95,823,000 shall be for payments ... for contract support costs"), quoting Interior Appropriations Act of 1995, Pub L No 103-332, 108 Stat 2499, 2511 (1994).