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Progress in Self-Determination: Navigating Funding for ISDA Contracts after Salazar v. Ramah Navajo Chapter

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SPECIAL FEATURES

PROGRESS IN SELF-DETERMINATION: NAVIGATING FUNDING FOR ISDA CONTRACTS AFTER *SALAZAR v.* *RAMAH NAVAJO CHAPTER**

*Steven L. Mangold***

In the recently decided *Salazar v. Ramah Navajo Chapter*,¹ the Supreme Court held that when Congress appropriates a sufficient amount of funds for any one contractor for contract support costs under a lump-sum appropriation for contracts under the Indian Self-Determination and Education Assistance Act (“ISDA”),² but an insufficient amount to cover all contractors under that sum, the government is liable for the shortfall. If Congress does not reform the ISDA funding structure, it will subject the government to liability any time it under-appropriates because it has promised full contract support funding for any qualifying self-determination contract. Thus, Congress has an incentive to retract this promise of full funding in order to avoid liability by eliminating either the mandate to provide full contract support costs or the mandate to accept every qualifying contract, as noted by the Supreme Court in *Ramah*. Other congressional responses could limit tribal contractors’ funding as well, such as line-item appropriations, as suggested by the Tenth Circuit, or limits on the rate of indirect-cost reimbursement, as noted by a 1999 General Accounting Office (“GAO”) (now Government Accountability Office) Report addressing the shortfall.

This Note argues that Congress should reject such responses that would weaken the ISDA and threaten the benefits it confers to Indian tribes who rely on ISDA contracts to manage their healthcare, law enforcement, and education programs. Rather, Congress should consider solutions to the funding problem that strengthen the ISDA, namely (1) direct spending

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1. 132 S. Ct. 2181 (2012).

2. Pub. L. No. 93-638, 88 Stat. 2203 (1975). The Indian Self-Determination and Education Assistance Act is comprised of two titles: Title I, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (2012), and Title II, the Indian Education Assistance Act, 25 U.S.C. §§ 455-458e (2012). Authorities have variously referenced the overall Act in short form by using the acronyms “ISDA” and “ISDEAA.” This Note will use “ISDA” in accordance with the Supreme Court’s practice in *Ramah*.

authorizations to federal agencies for ISDA contracts, (2) consolidation of direct and indirect program costs in ISDA contracts, and (3) cost-reimbursement incentive-type contract schemes. These solutions respect the self-determination policy underlying the ISDA by providing tribes with more control over their programs; incentivizing contractors to keep costs low by running efficient, effective programs; and limiting Congress's ability to appropriate insufficient ISDA funding. Therefore, *Salazar v. Ramah Navajo Chapter* can be a catalyst for the federal government to fulfill its obligations to American Indian tribes and, with the proper congressional response, become an opportunity to strengthen the ISDA program and enhance the progress of American Indian tribes in self-determination.

Table of Contents

| | |
|--|-----|
| I. Introduction | 263 |
| II. Self-Determination Contracts and the <i>Ramah</i> Dispute | 266 |
| A. The ISDA and Contract Support Costs..... | 266 |
| B. Congressional Appropriations and ISDA Funding..... | 276 |
| C. <i>Cherokee</i> and <i>Ramah</i> : Built on Ordinary Government Contracting Principles | 278 |
| III. Discussion and Critique of Currently Proposed Congressional Responses to the Shortfall Problem..... | 283 |
| A. Attempt Full Funding in the Existing Structure | 285 |
| B. Appropriate on a Contract-by-Contract Basis with a Line-Item Appropriation..... | 287 |
| C. Amend the ISDA to Eliminate the Mandate to Accept Every Qualifying Contract..... | 289 |
| D. Amend the ISDA to Eliminate the Requirement of Full Funding for Contract Support Costs..... | 291 |
| E. Amend the ISDA to Limit Indirect Cost Rates..... | 293 |
| F. Consolidate Direct Program Funds and Contract Support Costs in ISDA Contracts..... | 293 |
| IV. Recommended Solutions to Strengthen the ISDA Program and Solve the Contract Cost-Reimbursement Problem | 295 |
| A. Direct Spending Authorization for ISDA Contracts..... | 296 |
| B. Consolidate Direct Program and Contract Support Costs | 299 |
| C. Negotiate Cost-Reimbursement Incentive-Type Contracts..... | 300 |
| V. Conclusion | 303 |

I. Introduction

The ISDA allows Indian tribes to contract with the Bureau of Indian Affairs (“BIA”) and the Indian Health Service (“IHS”) for provision of services such as health care, education, and law enforcement.³ Out of their congressionally appropriated discretionary funds, the BIA and IHS allocate to the tribally administered contracts the amount of funds the agencies “would otherwise have provided” in the absence of such self-determination contracts.⁴ The ISDA further provides that tribes receive funding for “contract support costs” (“CSCs”)—their administrative and other indirect costs associated with running the federally funded programs.⁵ All funds for self-determination contracts and their CSCs are “subject to the availability of appropriations.”⁶

Congress supplies funds for the ISDA through a “lump-sum” appropriation to the BIA and the IHS under the Department of the Interior (“DOI”) and the Department of Health and Human Services (“HHS”), respectively.⁷ The Secretaries of these agencies allocate out of these discretionary funds the amounts required to fulfill obligations for

3. See *infra* notes 22–34 and accompanying text.

4. 25 U.S.C. § 450j-1(a)(1) (“The amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract . . .”).

5. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012) (5-4 decision) (describing the funding arrangement for CSCs for contracts entered into under the ISDA model contract as “[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement between the Secretary and the tribe. That amount ‘shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)],’ which includes contract support costs.” (citations omitted) (quoting 25 U.S.C. § 450l(c) (section 1(b)(4) of the model agreement))). See also *infra* notes 60–62 and accompanying text.

6. 25 U.S.C. § 450j-1(b) (“Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . .”). This language became important to the tribes’ litigation over unpaid CSCs. See *infra* notes 13, 60–61, 85–89 and accompanying text.

7. See *Ramah*, 132 S. Ct. at 2190; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1393–96 (Nell Jessup Newton et al. eds., LexisNexis 2012) [hereinafter COHEN’S HANDBOOK]; see also Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 106-291, 114 Stat. 922 (2000) (appropriating funds to the BIA “[f]or expenses necessary for the operation of Indian programs, as authorized by law, including . . . the [ISDA] . . . \$1,741,212,000, to remain available until September 30, 2002 except as otherwise provided herein . . .”).

contracting tribes' direct program⁸ and contract support costs.⁹ However, Congress has often imposed a cap on the amount of funds a Secretary could allocate for ISDA contract support costs.¹⁰ The amount in this cap has been sufficient to cover any tribe's claim to its CSCs under an individual self-determination contract, but insufficient to cover the costs for all tribes' contracts collectively.¹¹ Faced with a shortfall, the agencies have attempted a pro rata distribution of the authorized funds, leaving tribes with less than full reimbursement for their administrative and indirect expenses.¹²

The tribes sued in several instances of litigation spanning the last eighteen years.¹³ The courts reached varying conclusions, but the D.C. and

8. See 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-21 to -22 (3d. ed. 2006) (discussing the fiscal years at issue in the *Cherokee* litigation, saying, "The contracts . . . were funded from lump-sum appropriations to the Indian Health Service that . . . far exceeded the total payments due under the contracts and contained no restrictions . . ."); Petition for Writ of Certiorari at 29, *Ramah*, 132 S. Ct. 2181 (No. 11-551), 2011 WL 5145757 at *29 ("According to agency data, nearly 40% of the BIA's annual budget for social and economic programs for Indian tribes is administered directly by tribal organizations under ISDA self-determination contracts.").

9. See, e.g., Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 106-291, 114 Stat. 922 (2000) (appropriating a lump sum to the BIA that included but limited an amount payable for CSCs).

10. *Ramah*, 132 S. Ct. at 2187 (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999)) (discussing each fiscal year relevant to the litigation and saying that "Congress provided that 'not to exceed [a particular amount] shall be available for payments to tribes . . . for contract support costs' under ISDA."). See also *infra* notes 77-82 and accompanying text.

11. *Ramah*, 132 S. Ct. at 2187 ("During each relevant [fiscal year], Congress appropriated sufficient funds to pay in full any individual tribal contractor's contract support costs. Congress did not, however, appropriate sufficient funds to cover the contract support costs due all tribal contractors collectively.").

12. *Id.* ("Between [fiscal year] 1994 and 2001, appropriations covered only between 77% and 92% of tribes' aggregate contract support costs. The extent of the shortfall was not revealed until each fiscal year was well underway, at which point a tribe's performance of its contractual obligations was largely complete. . . . Lacking funds to pay each contractor in full, the Secretary paid tribes' contract support costs on a uniform, pro rata basis.").

13. See, e.g., *Ramah*, 132 S. Ct. 2181, *aff'g* *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054 (10th Cir. 2011), and *abrogating* *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071 (10th Cir. 2011); *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660 (9th Cir. 2001); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996); see also *Arctic Slope*, 629 F.3d at 1298 ("This case is the latest in a long-running dispute between the various Indian tribes and the

Federal Circuits held that the fact that the contracts were subject to the availability of appropriations (as most government contracts are) or the existence of the statutory cap meant the tribes were entitled only to what Congress appropriated, and therefore only to what the agencies distributed.¹⁴ In *Cherokee Nation v. Leavitt*, the Supreme Court reversed this trend by holding that when Congress appropriated enough unrestricted funds (i.e., without the statutory cap) for any one tribal contractor, but not enough for all tribes collectively, the “subject to the availability of appropriations” language did not bar recovery for the tribes.¹⁵ In *Salazar v. Ramah Navajo Chapter*, the Court reaffirmed *Cherokee* in a case where Congress did impose a statutory cap restricting the agencies’ allocation of funds for CSCs. *Ramah* held the tribes could still recover because the government had limited only what the agencies could do with the funds, not its ultimate liability for underfunding the contracts.¹⁶

Secretary concerning the Secretary’s obligation to pay contract support costs.”); Lloyd B. Miller, *A Most Unusual Alliance: Indian Tribes and Military Contractors Vindicate First Principles in the Ramah Litigation*, FED. LAW., Oct./Nov. 2012, at 48, 48–49 (“The persistence of the underpayments, sometimes totaling millions of dollars for individual tribal contractors, produced considerable litigation and conflicting circuit court opinions, compelling the Supreme Court to step in not once, but twice.” (footnote omitted)).

14. Petition for Writ of Certiorari, *supra* note 7, at 22 (noting that “the D.C. and Federal Circuits have both recognized, the ‘unequivocal statutory language’ of Section 450j-1(b) forecloses any contention that the ISDA guarantees full funding of contract support costs ‘as a matter of right.’” (citations omitted)).

15. See *Cherokee*, 543 U.S. at 637 (“[A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of ‘insufficient appropriations,’ even if the contract uses language such as ‘subject to the availability of appropriations,’ and even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.” (citation omitted)). The Court in *Cherokee* also noted that “subject to the availability of appropriations,” ordinarily interpreted, means only that “an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year.” *Id.* at 643. Thus, the phrase prevents agency contracting officers from binding the government absent congressional approval through appropriations, and “[s]ince Congress appropriated adequate unrestricted funds here, [the “subject to availability” clause] would not help the Government.” *Id.*; see also *id.* at 647 (concluding that the appropriations “provision[s] do[] not bar recovery here”); *infra* notes 85–89 and accompanying text.

16. See *Ramah*, 132 S. Ct. at 2190 (“The principles underlying *Cherokee Nation* and *Ferris* [upon which *Cherokee* relied] dictate the result in this case.”); *id.* at 2191–92 (rejecting the government’s attempt to distinguish *Cherokee* from *Ramah* on the presence of the “not too exceed” language that placed a cap on what the Secretary could allocate for contract support costs because the effect of that language was to “prevent[] the Secretary from reprogramming other funds to pay contract support costs—thereby protecting funds

This Note critiques Congress's possible responses, delineated in the *Ramah* decision and a 1999 General Accounting Office, now Government Accountability Office, ("GAO") report, that would undercut the ISDA by eliminating its full CSC funding promise, and argues that Congress and the federal agencies should instead strengthen the ISDA to provide tribes with more control over their ISDA funds, incentivize them to keep costs low, and limit congressional ability to underfund the entire program. Part II discusses the ISDA, funding schemes for CSCs, and the *Cherokee* and *Ramah* litigation. Part III evaluates and assesses critically the various options available to Congress noted by *Ramah* and the GAO in limiting liability for shortfalls in ISDA funding, determining that none of the proposed responses adequately meets the needs and goals of the ISDA. Part IV argues for a more robust solution, involving program-strengthening reforms to the ISDA, including a more flexible funding scheme in the form of direct spending authorization, direct program and contract support cost consolidation, and administering cost-reimbursement, incentive-type contracts. These are needed to fulfill the federal government's obligation to American Indian tribes and to meet the ISDA's self-determination goals.

II. Self-Determination Contracts and the *Ramah* Dispute

The litigation that culminated in the *Ramah* decision conjoined several distinct but interrelated areas of the law: the ISDA statute and its provisions regarding CSC funding, appropriations law and the methods Congress has employed to fund ISDA contracts and their support costs, and principles of government contracting law underlying the tribes' win in *Ramah*.¹⁷ This Part explores each area in turn.

A. The ISDA and Contract Support Costs

The United States federal government and the Native American Indian tribes within U.S. territory share a very special, historically dependent

that Congress envisioned for other BIA programs, including tribes that choose not to enter ISDA contracts. But when an agency makes competing contractual commitments with legally available funds and then fails to pay, it is the Government that must bear the fiscal consequences, not the contractor. . . . The agency's allocation choices do not affect the Government's liability in the event of an underpayment."); see also *infra* notes 102-09 and accompanying text.

17. See *Ramah*, 132 S. Ct. at 2186 ("Consistent with longstanding principles of Government contracting law, we hold that the Government must pay each tribe's contract support costs in full."). See generally Miller, *supra* note 12.

relationship.¹⁸ One of the principal aspects of this affiliation is the trustee–fiduciary relationship, a doctrine developed over centuries from original treaties and statutes, as well as court opinions, which often sought to justify federal use of Indian lands.¹⁹ More recently, the trust relationship has been construed as a limitation on the federal government in dealing with Indian tribes, preventing it from enacting destructive policies, but also justifying certain positive regulations.²⁰ For Congress, however, the limit is only “prudential” in that challenges to congressional action cannot rely on the trust relationship alone, but must invoke a constitutional basis.²¹ Nevertheless, “Congress takes the trust responsibility seriously,” and it is a “persuasive” and “motivating factor” for congressional action relating to Indian tribes.²²

Since the second half of the twentieth century, federal agencies such as the BIA and the IHS have administered and provided services such as health care, education, and law enforcement to Indian tribes and tribal organizations.²³ “In 1970, only 1.5% of BIA programs for Indians and only 2.4% of IHS programs were administered by Indian tribes and organizations.”²⁴ The policy reflected not only the view that “the federal government has a trust and treaty-based responsibility” to take care of the Indian tribes by providing such services, but also an erroneous “widespread belief throughout much of U.S. history that Indians were incapable of providing these services for themselves.”²⁵

18. See COHEN’S HANDBOOK, *supra* note 6, at 5 (“To understand twenty-first century Native American legal issues, one must be familiar with developments often dating back to the sixteenth, seventeenth, and eighteenth centuries. A wealth of seemingly non-legal data affects the legal relationship between Indians and the federal government. Furthermore, Indian law draws on disciplines as varied as anthropology, sociology, psychology, political science, economics, philosophy, and religion. The most significant of these sources is history.” (footnotes omitted)).

19. *Id.* at 412.

20. *Id.* at 415.

21. *Id.*

22. *Id.* at 416.

23. *Id.* at 1386; Addie Rolnick, *Why Salazar v. Ramah Navajo Chapter Is More than Simply a Federal Contracting Case*, PRAWFSBLAWG (June 28, 2012, 4:25 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/why-salazar-v-ramah-navajo-chapter-is-more-than-simply-a-federal-contracting-case.html> (recounting that until the ISDA, the U.S. policies toward Indian tribes “favor[ed] pervasive (and remote) federal control over almost every aspect of reservation life, from health care to policing schools to natural resource management.”).

24. COHEN’S HANDBOOK, *supra* note 6, at 1386.

25. Rolnick, *supra* note 23.

In 1970, President Nixon instituted a new policy—continued by every president since—that would allow tribes to administer directly the programs affecting them: “Self-determination without termination.”²⁶ This new vision acknowledged the history between the United States and the Indian tribes by affirming the trust and treaty-based obligations, but it discarded the idea of “Indian incompetence” by allowing tribes to determine for themselves how to administer their own programs and serve their communities.²⁷

Thus, Congress passed the Indian Self-Determination and Education Assistance Act (“ISDA”) in 1975 with the following findings:

The Congress, after careful review of the Federal government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.²⁸

26. COHEN’S HANDBOOK, *supra* note 6, at 1386–87. “Termination” is the term denoting the era from 1943 to 1961, in which the federal government instituted a “broad[] policy to terminate the federal-tribal relationship.” *Id.* at 84, 86.

27. *Id.* at 1387; Rolnick, *supra* note 23.

28. 25 U.S.C. § 450(a) (2012). The statute goes on to specify education as a central aspect of self-determination:

The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Id. § 450(b).

With these recognitions in mind, Congress articulated its new policy towards Indian tribes in unequivocal terms:

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.²⁹

The underlying goal of the ISDA is clear: to encourage tribal self-determination by empowering Indian tribes to provide and manage the services essential to their members.³⁰

29. *Id.* § 450a.

30. Rolnick, *supra* note 23 (“Broadly, [the ISDA’s] purpose is to facilitate tribes’ ability to control the programs and issues that affect their communities.”).

To implement the transition from federally run programs to self-determination contracts, the ISDA directs the Secretary of either the DOI or the HHS “upon the request of any Indian tribe . . . to enter into a self-determination contract”³¹ with few exceptions, meaning that the government must accept any qualifying contract from a tribe or tribal organization.³² Reflecting the history and purpose of the ISDA, the programs are for those services formerly provided directly by the federal government: among other things, “programs . . . for the benefit of Indians because of their status as Indians without regard to the agency or office of the [HHS] or the [DOI] within which it is performed.”³³ Such programs have included typical BIA programs—“law enforcement, social services, road maintenance, and forestry”—and typical IHS services such as “hospitals and health clinics; mental health; dental care; and environmental health services, such as sanitation.”³⁴

The tribes have responded earnestly, and “[t]oday, tribes administer more than half of [their] programs.”³⁵ Tribal administration of these programs has been fairly complete: in addition to subcontracting for the program services, tribes “assume[] responsibility for all aspects of [program] management, such as hiring program personnel, conducting program activities and delivering program services, and establishing and maintaining administrative and accounting systems.”³⁶ Moreover, there is evidence that the tribes “have excelled in running contracted federal programs,”³⁷ and they “have seen tremendous improvements in the quality and

31. 25 U.S.C. § 450f(a)(1) (“The Secretary [of the DOI or the HHS] is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof”); *id.* § 450b(j) (“[S]elf-determination contract’ means a contract . . . entered into . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law”).

32. *See* *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195 (2012) (“Congress obligated the Secretary to accept every qualifying ISDA contract”); COHEN’S HANDBOOK, *supra* note 6, at 1387 (noting that a Secretary may deny a tribe’s request for an ISDA contract in limited situations).

33. 25 U.S.C. § 450f(a)(1)(E).

34. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-150, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 5 (1999), available at <http://www.gao.gov/assets/230/227485.pdf> [hereinafter 1999 GAO REPORT].

35. COHEN’S HANDBOOK, *supra* note 6, at 1386.

36. 1999 GAO REPORT, *supra* note 34, at 5.

37. Miller, *supra* note 12, at 48 (citing Editorial, *A Formula for Cutting Health Costs*, N.Y. TIMES, July 22, 2012, at SR10).

responsiveness of programs, such as police, jails, and hospitals, since taking them over under the ISDA.”³⁸

Originally, the federal agencies funded ISDA programs with the same amount of funds that the Secretary of either agency would have allocated to such programs if they were still under federal control: specifically, the ISDA states that the amount “shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs”³⁹ With regard to these “direct program”⁴⁰ funds, “financial responsibility remains with the federal government,” even though program control is transferred to tribes and tribal organizations.⁴¹

However, under the original ISDA funding scheme, the federal government did not cover overhead, administrative, and indirect costs.⁴² Because the agencies were not running the programs, the tribes’ indirect costs associated with administering ISDA contracts exceeded those the federal government could minimize with its economies of scale for management and infrastructure.⁴³ For example, the direct program funds

38. Rolnick, *supra* note 22.

39. 25 U.S.C. § 450j-1(a)(1) (2012).

40. 1999 GAO REPORT, *supra* note 34, at 17 (observing that the funds for programs that the Secretary would otherwise have provided are known as “direct program” funds).

41. COHEN’S HANDBOOK, *supra* note 6, at 1393. In addition,

If a tribe operates the program more cheaply than the federal government did, it can keep the savings and put them back into the program. Where the federal government does not provide enough funding to perform the contract, the tribe has the option to suspend the operation on reasonable notice to the appropriate agency.

Id. (footnotes omitted).

42. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 106(h), 88 Stat. 2203, 2211-12 (1975) (codified as amended at 25 U.S.C. § 450) (providing for direct program costs but lacking provision for CSCs); *see supra* note 46 and accompanying text.

43. *See* COHEN’S HANDBOOK, *supra* note 6, at 1393 (noting that administrative costs ate up the tribe’s contractual funding); *see also* Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2186 (2012) (“It soon became apparent that this secretarial amount failed to account for the full costs to tribes of providing services.”); Rolnick, *supra* note 23 (“When the Act was first passed, tribes received only the amount the agency would have directly allocated to their program, but a lot of the program money was eaten up by indirect administrative costs, for which the agencies generally did not reimburse tribes. For example, while the Indian Health Service would have relied on its own administrative funding to cover overhead and administrative costs of running a hospital on Tribe X’s reservation (e.g., liability insurance and employee fringe benefits), Tribe X would only receive the amount directly allocated to hospital programming, with the agency retaining its full administrative funding. Tribe X

did not cover “federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements.”⁴⁴ Without funding for these costs, “tribal resources ‘which are needed for community and economic development must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.’”⁴⁵ To remedy the problem, Congress amended the ISDA in 1988 to provide for “contract support costs” in addition to the general contract funds.⁴⁶

The ISDA carefully defines “contract support costs,” as those costs over and above direct program costs—those “the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.”⁴⁷ Contract support costs include the tribal contractor’s “reasonable costs” incurred “to ensure compliance with the terms of the contract and prudent management” but are not “normally . . . carried on by the respective” agency or “are provided . . . from resources other than those under contract.”⁴⁸ Such costs include not only the “direct program expenses” associated with a specific contract, but also “any additional administrative or . . . overhead” costs connected to the “program, function, service, or activity pursuant to the contract”⁴⁹

Elsewhere, the ISDA statute is more explicit in its requirement that CSCs be fully funded: “Upon the approval of a self-determination contract, the Secretary *shall* add to the contract the *full amount* of funds to which the contractor is entitled under [§ 450j-1(a) of the ISDA]”⁵⁰ Thus, while subject to the various determinations as to what comprises CSCs, Congress

might be forced to cover these overhead costs by cutting hospital services or laying off staff. So Congress amended the ISDA to require the agencies to pay contract support costs.”)

44. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1058 (10th Cir. 2011) (quoting S. REP. NO. 100-274, at 8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627).

45. *Id.* at 1058 (quoting S. REP. NO. 100-274, at 9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2628).

46. *See* Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988); 25 U.S.C. § 450j-1(a)(2) (providing for the funding of contract support costs); COHEN’S HANDBOOK, *supra* note 6, at 1394 (recounting Congress’s amendment to include support costs).

47. 25 U.S.C. § 450j-1(a)(1).

48. *Id.* § 450j-1(a)(2).

49. *Id.* § 450j-1(a)(3)(A). The statute further provides that the function for CSCs “shall not duplicate” any funding the Secretary would otherwise have provided for direct programs. *Id.*

50. *Id.* § 450j-1(g) (emphasis added by *Ramah*, 644 F.3d at 1058).

perceived the tribal need for funding so acutely as to express the requirements in the ISDA in terms of entitlement.⁵¹

CSCs include “both direct program expenses and administrative and other overhead expenses,” which the BIA and IHS have broken down into three distinct categories: “[i]ndirect costs,” “[d]irect contract support costs,” and “[s]tartup costs.”⁵² Indirect costs are associated with overhead costs for administering the programs and managing the contracts.⁵³ They are not associated with any particular program, but rather typically include costs such as “financial and personnel management, property and records management, data processing and office services, utilities, janitorial services, building and grounds maintenance, insurance, and legal services.”⁵⁴ In contrast, direct contract support costs are associated with particular programs, including: the “[c]osts of activities that are not contained in either the indirect cost pool or the direct program funds,” typically including “training required to maintain the certification of direct program personnel and the costs related to direct program salaries, such as unemployment taxes, workers’ compensation insurance, and retirement costs.”⁵⁵ Finally, startup costs are the one-time costs associated with beginning a new program, such as purchasing equipment, hiring staff, and setting up administrative facilities and systems.⁵⁶

Combining the figures for all such costs, the BIA and the IHS fund CSCs according to a formula that adds direct contract support costs to the indirect costs (determined according to a negotiated rate multiplied by the total

51. The Tenth Circuit emphasized the obligation-inducing nature of the statutory language. *See Ramah*, 644 F.3d at 1058–59 (referring to tribal contractors’ claim to contract funding as an “entitlement” after reviewing the various statutory provisions for contract support cost funding).

52. 1999 GAO REPORT, *supra* note 34, at 17–18 & tbl.1.1; *see also id.* at 25 n.1 (“The legislative history of the 1988 amendments to the Indian Self-Determination and Education Assistance Act discloses that the Congress substituted ‘contract support costs’ for ‘contract costs’ in the provision prescribing funding of reasonable costs to manage the contracts. It specifically chose not to use ‘direct and indirect’ costs when describing what these costs cover. In the 1996 joint agency regulations, contract support costs include direct costs, startup costs, and indirect contract costs. Prior to the regulations, it was the agencies’ practice to use the term indirect costs as the largest component of contract support costs.”).

53. *See id.* at 18 tbl.1.1.

54. *Id.* (noting that “[t]here is no universal rule for classifying certain costs as either direct or indirect under every accounting system. The types of costs classified as indirect costs may vary by tribe depending on its particular circumstances.” (citations omitted) (internal quotation marks omitted)).

55. *Id.*

56. *See id.*

direct program costs) and any identifiable startup costs.⁵⁷ In all, direct program funds are the same year after year, unless there is a change in what BIA or IHS would have budgeted for those programs if it ran them, but CSCs vary from year to year depending on the indirect cost rate and the presence of startup costs.⁵⁸ Indirect costs comprise the majority of CSCs that the agencies must fund.⁵⁹

Congress provides funds for the self-determination contracts and their support costs through the annual BIA and IHS lump-sum appropriations.⁶⁰ The ISDA provides that contract funding 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 to another tribe or tribal organization” when distributing ISDA funds.⁶¹ These funding stipulations are present in the ISDA’s model agreement incorporated into every ISDA contract.⁶²

While the amount that Congress has appropriated for the ISDA program has always been sufficient to satisfy the funding agreement for any individual contractor, it has not always been sufficient to pay all tribes their full, negotiated support costs.⁶³ Despite the shortfall, the Anti-Deficiency Act prevents government officials from unauthorized government spending; thus, the agencies have been forced to underpay tribes for their support costs when Congress under-appropriates to the ISDA program.⁶⁴

57. *See id.* at 19.

58. *See id.*

59. *Id.* at 6.

60. *See supra* note 6 and accompanying text.

61. 25 U.S.C. § 450j-1(b) (2012).

62. *Id.* §§ 450l(a), 450l(c) (setting forth the model contract and providing that it must be incorporated into every ISDA contract). Under “Funding amount,” the Model Contract provides, “Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement” *Id.* § 450l(c) (section 1(b)(4) of the model agreement) (mirroring statutory funding language).

63. *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2188 (2012) (noting the shortfall leading to the tribe’s lawsuit); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 635–36 (2005) (same); *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1056–57 (10th Cir. 2011) (“Congress has mandated that all self-determination contracts provide full funding of CSCs [contract support costs], *see* § 450j-1(g), but has nevertheless failed to appropriate funds sufficient to pay all CSCs every year since 1994”); *see also* COHEN’S HANDBOOK, *supra* note 6, at 1394–96.

64. *See Ramah*, 132 S. Ct. at 2193 (noting the Anti-Deficiency Act’s prohibition on payments by officials for which Congress has not appropriated money from the treasury); *see also* Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (2012) (prohibiting government employees from committing public funds without appropriation by Congress). In *Cherokee*,

Attempting an equitable distribution, the BIA and IHS began paying tribes on a pro-rata basis, leaving the tribal contractors with only a fraction of their negotiated funds after incurring the full cost of performing their ISDA contracts.⁶⁵

The negative effects of the shortfalls for successive fiscal years underscore the importance of the CSCs to tribes' self-determination efforts under the ISDA.⁶⁶ In a 1999 General Accounting Office Report ("1999 GAO Report"), the GAO, now Government Accountability Office, interviewed the officials of over ninety tribes about the shortfall problem.⁶⁷ The 1999 GAO Report found, "The effects varied, depending on the number and the type of methods the tribes employed to deal with these funding shortfalls."⁶⁸ Furthermore,

To compensate for them, nearly all the tribes have reduced their indirect costs to manage programs within the funds provided, thereby lessening administrative productivity and efficiency. Furthermore, many tribes have had to cover the shortfalls with tribal resources, if available, thereby foregoing the opportunity to use those resources to promote the tribes' economic development. Many tribes had to use direct program funds to cover the shortfalls, thereby reducing direct program services. In addition, a few tribes said they have refused or postponed the opportunity to contract programs, thereby stalling their progress toward self-determination.⁶⁹

Indeed, the effects appear to mirror the deficiencies in the former, inadequate federal policy toward Indian tribes that Congress described as a

the IHS claimed that it could not pay contract support costs in full because it had allocated its discretionary spending to other programs, such as running its Washington D.C. office, and therefore could not afford to pay full contract support costs to the tribes. *See Cherokee*, 543 U.S. at 641–42. In *Ramah*, the government argued that the BIA Secretary could not pay out full contract support cost funding because of the existence of a statutory cap—a figure Congress set as part of the BIA's discretionary appropriations. *See Ramah*, 132 S. Ct. at 2191.

65. *See Ramah*, 132 S. Ct. at 2187 ("Between FY 1994 and 2001, appropriations covered only between 77% and 92% of tribes' aggregate contract support costs.").

66. *See Rolnick*, *supra* note 23 ("[F]ederal Indian programs remain devastatingly underfunded, and this under-funding is passed through to tribes via the ISDA. This is precisely why contract support costs matter so much to tribes.").

67. 1999 GAO REPORT, *supra* note 34, at 38.

68. *Id.*

69. *Id.*

reason to initiate the ISDA scheme.⁷⁰ Yet, Congress has simply acknowledged the shortfalls as a consequence of tighter budgets,⁷¹ making little to no effort to pay the government's debts to the tribal contractors. In response, the tribes have had to sue for damages on breach of contract to pay full support costs.⁷²

B. Congressional Appropriations and ISDA Funding

The U.S. Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"⁷³ Thus, Congress finances ISDA contracts by appropriating funds to the BIA and the IHS. Congress can pass legislation that authorizes the withdrawal of funds according to set criteria, or, as is more common, it can pass an appropriations act that lasts for one or more fiscal years.⁷⁴ A House of Representatives committee or subcommittee usually starts an appropriations bill, which the Senate then amends before both houses pass the bill and send it to the President. Appropriations acts come in four kinds: (1) regular,

70. See *supra* notes 24–28 and accompanying text.

71. See Petition for Writ of Certiorari, *supra* note 7, at 28. "[T]he Conference Report accompanying the first capped appropriation for the BIA in FY 1994 explained that it was necessary to impose a limit because 'significant increases in contract support will make future increases in tribal programs difficult to achieve.'" *Id.* (quoting H.R. REP. NO. 103-299, at 28 (1993) (Conf. Rep.)). "Likewise, legislators explained their decision to continue limiting the appropriations available to the Indian Health Service for contract support costs in FY 2000 on the ground that Congress 'cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes.'" *Id.* (quoting *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1306 (2010) (quoting in turn H.R. REP. NO. 106-222, at 112 (1999))).

72. See, e.g., *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2188 (2012) (recounting that the respondent tribes sued for breach of contract); *Cherokee Nation v. Leavitt*, 543 U.S. 631, 635–36 (2005) (deciding two cases in which the tribes submitted claims for payment on the ISDA contracts); *Arctic Slope*, 629 F.3d at 1298, *vacated*, 132 S. Ct. 2181 (2012) (noting that *Arctic Slope* was, at the time, "the latest in a long-running dispute between the various Indian tribes and the Secretary concerning the Secretary's obligation to pay contract support costs"). The ISDA provides that the contractor may sue the government for money damages under the Contract Disputes Act, 41 U.S.C. §§ 601–613 (2012), if the government fails to pay out on a valid ISDA contract. 25 U.S.C. § 450m-1(d) (2012); COHEN'S HANDBOOK, *supra* note 6, at 1394–96.

73. U.S. CONST. art. I, § 9, cl. 7.

74. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 215 (3d ed. 2007) ("In contrast to authorizing legislation, which is presumed to be permanent, an appropriations act and any substantive provisions in it expire at the end of the fiscal year—unless the text makes them permanent or effective beyond the fiscal year.").

lasting a single fiscal year;⁷⁵ (2) supplemental, made to commit “additional budget resources when the regular appropriation is deemed insufficient”;⁷⁶ (3) continuing, which “fund agencies that have not received regular appropriations by the start of the fiscal year”;⁷⁷ and (4) permanent, which are “usually enacted in substantive legislation [and] become available without current action by Congress.”⁷⁸ For the ISDA, Congress appropriates funds for the BIA and the IHS each fiscal year with a regular appropriation,⁷⁹ although in some years it makes appropriations in a continuing resolution.⁸⁰

Congress can place certain restrictions within an appropriations act on how a given agency might use its discretionary funds.⁸¹ Thus, for example, in 1994 Congress made funds available for the ISDA contracts, “[p]rovided . . . [t]hat *not to exceed \$91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the [ISDA] for fiscal year 1994 and previous years . . .*”⁸² That was the first year that Congress placed such a restriction on indirect-cost spending for the BIA appropriation.⁸³ The Conference Report accompanying that act

75. *Id.* (noting that regular appropriations establish “budget authority for the upcoming fiscal year . . . or for the year in progress.”).

76. *Id.*

77. *Id.* (noting that continuing appropriations are usually called continuing resolutions because they are passed by joint resolution between the House and the Senate).

78. *Id.*

79. *See* *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012) (“During Fiscal Years (FYs) 1994 to 2001, respondent Tribes contracted with the Secretary of the Interior to provide services During each FY, Congress appropriated a total amount to the [BIA] ‘for the operation of Indian programs.’” (citation omitted)).

80. *See* Continuing Appropriations Resolution of 2013, Pub. L. No. 112-175, 1267 Stat. 1313 (2012) (continuing appropriations made in “The Department of the Interior, Environment, and Related Agencies Appropriations Act 2012 (division E of Public Law 112-74).”); *see also* SCHICK, *supra* note 74, at 215 (defining continuing appropriations as bills that “fund agencies that have not received regular appropriations by the start of the fiscal year”).

81. SCHICK, *supra* note 74, at 263 (“Sometimes the appropriations act itself specifies that a portion of the money in the account be used for designated purposes. The appropriation might specify that ‘not less than’ a certain amount should be spent on a particular activity. When this or similar language appears in an appropriations act, the spending agency usually ‘fences off’ the money by treating it as a subaccount.”).

82. Department of the Interior and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-138, 107 Stat. 1379 (1993) (emphasis added).

83. *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1059 (10th Cir. 2011) (“In 1994, Congress began capping CSC funding.”).

stated that the restriction grew out of a concern for rising CSCs and cautioned that “it is unlikely that large increases for this activity will be available in future years’ budgets. . . . [S]ignificant increases in contract support will make future increases in tribal programs difficult to achieve.”⁸⁴ For fiscal year 1995, a Senate Report noted another shortfall in the CSC budget but “advised that the ‘shortfalls should be treated as onetime occurrences and should not have any impact on determining future indirect cost rates.’”⁸⁵ Nevertheless, Congress continued the “not to exceed” restriction on the BIA appropriation for every subsequent fiscal year, eventually changing the language to include all “contract support costs.”⁸⁶

C. Cherokee and Ramah: Built on Ordinary Government Contracting Principles

Tribal contractors have twice reached the Supreme Court arguing to receive unpaid CSCs, and they have succeeded on both occasions. In the first case, *Cherokee Nation v. Leavitt*, decided in 2005, the government relied upon the “subject to the availability of appropriations” language to argue that it was not liable for unpaid CSCs that went beyond Congress’s unrestricted lump-sum appropriation.⁸⁷ Unlike the appropriation for the BIA, the funds for the IHS did not contain a “not to exceed” CSC amount in its lump-sum appropriation.⁸⁸ Thus, the IHS was not limited in its discretionary budget to pay for tribes’ CSCs.

Since the IHS could allocate funds at its discretion, the agency prioritized some expenditures over CSC payments, and once the appropriations ran out, they were no longer “available” to the tribes, or so the government argued.⁸⁹ The Court disagreed with the government and reasoned that “subject to the availability of appropriations” did not mean that the tribal contractors were entitled only to what the agency, in its

84. *Id.* (quoting H.R. REP. NO. 103-299, at 28 (1993) (Conf. Rep.)).

85. *Id.* (quoting S. REP. NO. 103-294, at 57 (1994)).

86. *Id.* (“[F]unding shortfalls for CSCs were repeated every fiscal year from 1994 to 2001. Later appropriations acts, usually passed at the beginning of the fiscal year, used the phrase ‘contract support costs’ rather than ‘indirect costs,’ but each included the same ‘not to exceed’ language.” (citations omitted)).

87. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 636 (2005) (“[The government’s] sole defense consists of the argument that it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so.”).

88. *See* Department of the Interior and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-138, 107 Stat. 1379 (1993).

89. *Cherokee*, 543 U.S. at 643–44 (rejecting the government’s reliance on the “subject to the availability of appropriations” clause).

discretion, decided to allocate to the tribes.⁹⁰ Rather, the clause had an “ordinary” meaning as an often-used government contracts phrase indicating that “an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year.”⁹¹ “Subject to the availability of appropriations,” then, means only that a government contract will not become binding unless and until Congress appropriates funds for the contract. The validity of the contract hinges on whether Congress allocates sufficient funds to the agency, in effect approving the contracting officer’s negotiation.

Rejecting the government’s arguments for treating the ISDA contracts as “special,”⁹²—i.e. giving the clause more weight than for normal government contracts—the Court instead treated the contracts as ordinary government contracts and held that

as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of “insufficient appropriations,” even if the contract uses language such as “subject to the availability of appropriations,” and even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.⁹³

The Court noted that the ISDA “uses the word ‘contract’ 426 times to describe the nature of the Government’s promise”⁹⁴ Thus, the Court treated the ISDA agreements as regular contracts, making the government liable for what it had promised.⁹⁵ The “subject to the availability” clause had no effect on liability, if, from the individual contractor’s point of view,

90. *Id.*

91. *Id.* at 643, 644 (noting that the government had the burden to show why the Court “should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary”).

92. *Id.* at 638–39, 643–44 (rejecting the government’s argument based on a special “government-to-government” relationship between the federal government and the tribes, that the ISDA contracts put the tribes in the shoes of a federal agency and must deal with Congress’s restrictions in appropriations as an agency must, and that a “special, rather than ordinary, interpretation” should be given to the contractual language).

93. *Id.* at 637 (citation omitted).

94. *Id.* at 639 (defining “contract” according to the RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979)).

95. *See id.* (rejecting the government’s argument that the ISDA means the contracts should be treated specially).

sufficient funds were available (as part of the lump-sum appropriation) to satisfy its CSC needs.⁹⁶

The *Cherokee* Court based its decision on a long-standing government contracting principle known as the *Ferris* doctrine, based on an 1893 Court of Claims case, *Ferris v. United States*.⁹⁷ That case involved a contract between the federal government and a private company for drainage work on the Delaware River.⁹⁸ The dredgers began performance under the contract and substantially completed much of the work; however, they stopped mid-way because the funds appropriated for the contract ran out (they were distributed to other contractors).⁹⁹ The court held that the dredgers were entitled to the full amount due under the contract when the government appropriated enough to satisfy the dredger's contract, though it could not satisfy all of the contracts made under the appropriation¹⁰⁰:

A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted [sic] to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.¹⁰¹

96. *Id.* at 639–40.

97. *See id.* at 637–38 (drawing on government contracting principles with regard to appropriations, specifically from *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1893)).

98. *See Ferris*, 27 Ct. Cl. at 542–43 (describing the nature of the government contract at issue).

99. *See id.* at 543–44 (describing how the contractors were delayed in their efforts but claimed lost profits when appropriations ran out).

100. *See id.* at 547 (concluding that the contractor was entitled to lost profits that it would have received from full contract funding).

101. *Id.* at 546 (citing *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883)). *Dougherty*, also cited in *Cherokee* and *Ramah*, says the following about liability under government contracts:

Next it is said that the contract was void because the annual appropriation had, at the time of the purchase been covered by other contracts. We held in *Shipman's* case, this term . . . that when one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it; but we have never held that persons contracting with the Government for partial service under general appropriations are bound to know

Thus, the *Ferris* decision means that the government cannot avoid liability under a contract by distributing funds under a lump-sum appropriation in such a way that the funds are exhausted as to a specific contractor who would otherwise fall within the lump-sum appropriation.¹⁰²

Applying *Ferris*, the Court's decision in *Cherokee* was a win for Indian tribes seeking full payment of their CSCs under the ISDA; where Congress had provided sufficient *unrestricted* appropriations, no cap limited the agency's spending on CSCs.¹⁰³

However, the federal government continued to avoid paying in full when Congress *restricted* the appropriations that agencies could use for CSCs through a "not to exceed" limitation on the agencies' discretionary spending.¹⁰⁴ The circuit courts split on this post-*Cherokee* litigation, with the Federal Circuit finding against the tribes in *Arctic Slope* and the Tenth Circuit for the tribes in *Ramah*.¹⁰⁵ The Supreme Court stepped in to resolve the split in 2012 and found in favor of the tribes, affirming the Tenth Circuit's decision—a boon to tribal interests before the Supreme Court and an important holding in its own right with respect to other government

the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block the wheels of the Government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.

Dougherty, 18 Ct. Cl. at 503; *see also Cherokee*, 543 U.S. at 643 (citing *Dougherty*, 18 Ct. Cl. at 503); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) (citing *Dougherty*, 18 Ct. Cl. at 503)).

102. *See Ramah*, 132 S. Ct. at 2189 (summing up the rule from *Cherokee*, which relied on *Ferris* and *Dougherty*) ("When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends.").

103. *Id.* (describing the Court's holding in *Cherokee*).

104. *See id.* at 2187 (noting the statutory cap Congress placed on the amount of appropriations that could be used for ISDA contract support costs); COHEN'S HANDBOOK, *supra* note 6, at 1395 (observing that "Cherokee Nation did not involve an appropriations act specifically capping payment of contract support costs. Again faced with a shortfall in funds, the Secretary began paying all contract support costs on a pro rata basis."); Rolnick, *supra* note 23 (noting that the only difference between *Ramah* and *Cherokee* was "[t]he existence of the statutory cap"); *supra* notes 81–86 and accompanying text.

105. *See Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1306 (2010) (deciding against the tribes). *But see Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1077 (2011), *aff'd*, 132 S. Ct. 2181 (2012) (deciding for the tribes).

contractors.¹⁰⁶ In *Ramah*, the Court stated that the principles underlying *Cherokee* “dictate[d] the result” in that case because the statutory cap on CSC spending still exceeded the amount necessary to satisfy any one ISDA contractor.¹⁰⁷ As in *Cherokee*, the Court in *Ramah* relied heavily on the *contractual* nature of the obligation and rejected Congress’s attempt to limit liability by restricting the agencies’ ability to provide CSCs.¹⁰⁸

The Government attempted to distinguish *Ramah* from *Cherokee* by invoking the statutory cap Congress placed on the amount of ISDA funds for CSCs.¹⁰⁹ The Court rejected the attempt as a distinction without a difference, finding that in both cases, “the agency remained free to allocate funds among multiple contractors, so long as the contracts served the purpose Congress identified.”¹¹⁰ The “not to exceed” language instead meant only that the agency could not use funds other than those specified to supplement the support cost appropriation in case of a shortfall.¹¹¹ As in other government contracts, the under-appropriation affected only the *agency’s action* in distributing the funds; it did not affect the government’s *liability* for breaching the contracts.¹¹² Thus, the Court rested its decision squarely on the *Ferris* doctrine reiterated in *Cherokee* when interpreting the statutory language incorporated in the ISDA contracts.¹¹³

106. *Ramah*, 132 S. Ct. at 2195 (affirming the Tenth Circuit and vacating the Federal Circuit’s decision in *Arctic Slope*).

107. *Id.* at 2190 (“The principles underlying *Cherokee Nation* and *Ferris* dictate the result in this case. Once ‘Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of ‘insufficient appropriations,’ even if the contract uses language such as ‘subject to the availability of appropriations,’ and even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.’” (quoting *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637 (2005))).

108. *See Ramah*, 132 S. Ct. at 2188, 2191 (reiterating *Cherokee*’s insistence on treating the ISDA agreements as ordinary contracts and adopting that position with regard to the *Ramah* contracts).

109. *See id.* at 2191 (describing *Ramah* and *Cherokee*’s differences from *Ferris*).

110. *Id.* at 2192 (holding that the differences between *Ramah*, *Cherokee*, and *Ferris* were insignificant under the circumstances).

111. *See id.* (noting that the “not to exceed” language did have legal effect by “protecting funds that Congress envisioned for other BIA programs, including tribes that choose not to enter ISDA contracts”).

112. *See id.* at 2191 (standing for the proposition that contractors are “‘not chargeable with knowledge’ of [an agency’s distribution choices], ‘nor [could their] legal rights be affected or impaired by its maladministration or by its diversion.’” (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1893))).

113. *See id.* at 2190–91 (“The principles underlying *Cherokee Nation* and *Ferris* dictate the result in this case.”).

Construing the contracts for the benefit of the tribes,¹¹⁴ the Court affirmed that the government is legally obligated to fund tribal CSCs. In doing so, however, it left resolution of the problem in the hands of Congress.¹¹⁵ Since the tribes sued for money damages under the Contract Disputes Act, as directed by the ISDA, they could recover from the Judgment Fund for any damages caused by the government's breach by nonpayment.¹¹⁶

Nevertheless, the tribe's legal action remains the only remedy available, precipitating a lawsuit to force the government's hand when Congress under-appropriates.¹¹⁷ The Court noted several possible solutions that Congress might adopt to avoid further liability.¹¹⁸ Part III analyzes these solutions and others suggested by the 1999 GAO Report with a critical eye toward the policy articulated by the ISDA as well as federal budget concerns for efficiency, ultimately determining that these solutions fail to meet the self-determination goals of the ISDA. Part IV argues that Congress should reject the responses that would weaken the ISDA. Instead, Congress should embrace robust reforms in the funding and cost structure of ISDA contracts. These reforms would incentivize efficiency while ensuring full funding, thereby fulfilling the obligation set forth in the ISDA to increase the responsiveness of public services to tribal needs and enhance the progress of American Indian tribes through self-determination.

III. Discussion and Critique of Currently Proposed Congressional Responses to the Shortfall Problem

Having established the background to *Ramah* and its underlying theories in the preceding Part, this section will explore the options open to Congress

114. *Id.* at 2191 (“[E]ach provision of the [ISDA] and each provision of this [Model] Contract shall be liberally construed for the benefit of the Contractor.” (quoting 25 U.S.C. § 240l(c) (2012))).

115. *See id.* at 2195 (“On the one hand, Congress obligated the Secretary to accept every qualifying ISDA contract, which includes a promise of ‘full’ funding for all contract support costs. On the other, Congress appropriated insufficient funds to pay in full each tribal contractor. The Government’s frustration is understandable, but the dilemma’s resolution is the responsibility of Congress.”).

116. *See id.* at 2193–94.

117. *But see infra* notes 130–31 and accompanying text (noting that the government, knowing it faces liability, will avoid the lawsuit by supplementing the appropriation to cover the shortfall).

118. *Ramah*, 132 S. Ct. at 2195 (suggesting various options available to Congress, and noting that “[t]he desirability of these options is not for us to say. We make clear only that Congress has ample means at hand to resolve the situation underlying the Tribes’ suit.”).

to stop the liability leak caused by chronic shortfalls in appropriations. Whether Congress has intentionally or inadvertently underfunded tribes' CSCs—and there is evidence to suggest that it has done so intentionally, albeit ostensibly begrudgingly¹¹⁹—the government is now unquestionably faced with a breach of contract when Congress appropriates insufficient funds for tribes' CSCs.¹²⁰ Given the possibility of liability iterated in *Ramah*, Congress now has an incentive to retract its full-funding promise and force tribes to cut costs, rather than cede control to the federal agencies and the tribes and simply appropriate full funds. This Part will demonstrate that solutions in line with this incentive to retract the full-funding promise either fail to respect the ISDA's self-determination goals or continue to subject the federal government to liability after *Ramah*.

In evaluating these potential solutions, several criteria should be considered. First, Congress must be able to either limit the government's liability or ensure that shortfalls do not occur that could subject the

119. See *supra* note 71. See also Petition for Writ of Certiorari, *supra* note 7, at 26. For more than a decade, the BIA published a notice in the Federal Register each year describing the shortfalls in funding for contract support costs and the methodology the agency would use to allocate the available money. As the dissent below explained, the 'very purpose' of these notices was to 'warn[] tribal organizations of the possibility of insufficient funding.' In 2006, in consultation with tribes, the agency adopted an explicit nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. And each year the BIA has developed its budget requests—including any requests for additional contract support cost funding—in consultation with the tribes. The inadequacy of available appropriations, in short, has been "no secret."

Id. (internal citations omitted) (citing 25 U.S.C. § 450j-1(i) (2012)).

120. See *Ramah*, 132 S. Ct. at 2195 ("For the period in question [that is, until Congress resolves the shortfall dilemma], it is the Government—not the Tribes—that must bear the consequences of Congress' decision to mandate that the Government enter into binding contracts for which its appropriation was sufficient to pay any individual tribal contractor, but 'insufficient to pay *all* the contracts the agency has made.'" (quoting *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637 (2005))); Petition for Writ of Certiorari, *supra* note 7, at 16 (referring to the Tenth Circuit's declaration below "that the government is liable for the contract support costs requested by every tribal contractor, notwithstanding the appropriations caps, because 'Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise.'" (citation omitted)); *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1070 n.9 (10th Cir. 2011) ("[25 U.S.C.] § 450j-1(b) is necessarily violated whenever Congress appropriates less than total contract support cost need.").

government to liability.¹²¹ Second, Congress must be able to maintain some measure of control over the amount of CSCs it funds—incentives must be in place to encourage tribes to run their programs efficiently.¹²² Third, the solution should encourage tribes to enter into ISDA contracts.¹²³ Finally, and corollary to the third, the solution must not undercut the ISDA's original self-determination purpose by discouraging tribes from entering into ISDA contracts or so under-funding the program that tribes would be better off without such contracts.¹²⁴

With these criteria in mind, this Part analyzes each potential solution in turn, from varying appropriations methods and amendments to the statutory funding structure, to negotiated changes in the nature of ISDA contracts. Solutions have been suggested by the Tenth Circuit,¹²⁵ the Supreme Court in *Ramah*,¹²⁶ and the 1999 GAO Report seeking to address the CSC shortfall problem.¹²⁷ The following subparts introduce and analyze these suggested solutions that could eliminate liability or shortfalls but fail one or more of the criteria set forth above.

A. Attempt Full Funding in the Existing Structure

The first possible solution is to take no action.¹²⁸ Congress would remain liable for shortfalls, but maintaining the status quo allows Congress to

121. Liability for under-funding the ISDA will be an ongoing problem as the government will receive requests for supplementary appropriations and, if those requests are denied, will be required to pay the tribes' contract claims out of the Judgment Fund eventually. *See infra* notes 127–28 and accompanying text. Moreover, if no changes are made, the contracting tribes will be in the same position as before *Ramah*, incurring injuries for lack of funding for their programs. *See supra* Part II.A.

122. *See supra* note 84 and accompanying text (noting that Congress placed the “not to exceed” restriction in its ISDA appropriations out of concern for rising CSCs); *infra* note 151 and accompanying text (noting that Congress has underfunded the ISDA program because of its concern for rising costs and because it wants to maintain control over the program's funds); *see also infra* note 132 and accompanying text (noting that ISDA contract costs will likely continue to rise).

123. *See supra* notes 35–38 and accompanying text (describing the popularity of the ISDA programs and the benefits the contracts have conferred to participating tribes).

124. *See supra* notes 66–70 and accompanying text (describing the negative effects of the shortfall problem, including the response of some tribes to forego the opportunity to contract for program control).

125. *See infra* Part III.B.

126. *See supra* note 118.

127. *See* 1999 GAO REPORT, *supra* note 34.

128. Bernard J. Pazanowski, *Tribes Get All Support Costs Under Contract Despite Congressional Effort to Cap Payment*, 80 U.S.L.W. 1756 (June 26, 2012), available at http://news.bna.com/lwn/LWLNWB/split_display.adp?fedfid=27122891&vname=lw1notallis

continue to control the funds that go to CSCs, as it has with the “not to exceed” restriction on the BIA’s discretionary spending.¹²⁹ Tribes can then threaten to sue the government under the Contract Disputes Act and recover from the Judgment Fund.¹³⁰ Presumably, the government will avoid the losing lawsuit, and the agency will request supplemental appropriations for any shortfalls.¹³¹ Shortfalls are not inevitable; however, there is evidence to suggest that Congress is attempting to increase transparency—so that it can come closer to appropriating the actual CSCs needed—without changing the appropriation process or the nature of the contracts at all, meaning that

sues&jd=a0d3e6c6u7&split=0 (interviewing Herbert L. Fenster, “who filed an amicus brief in [*Ramah*] supporting the tribes on behalf of the U.S. Chamber of Commerce and the National Defense Industrial Association,” saying “that he does not expect the opinion to alter the way government agencies do business.” He said, “I think the government has so much invested in making its contractors ‘volunteers’ in financing some government work, that it will not respond at all to this decision.”).

129. See Petition for Writ of Certiorari, *supra* note 7, at 20–21 (arguing that “Congress made clear in at least four places in the [ISDA] that it intended to exercise complete control over the disbursement of funds from the Treasury for federal programs administered by tribes under the ISDA, just as it would if the same programs were administered by the Secretary directly.”).

130. See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193 (2012) (“Congress expressly provided in ISDA that tribal contractors were entitled to sue for ‘money damages’ under the Contract Disputes Act upon the Government’s failure to pay, 25 U.S.C. §§ 450m-1(a), (d), and judgments against the Government under that Act are payable from the Judgment Fund, 41 U.S.C. § 7108(a).” (footnote omitted)); *id.* (“[T]he Government argues that Congress could not have intended for respondents to recover from the Judgment Fund, 31 U.S.C. § 1304, because that would allow the Tribes to circumvent Congress’ intent to cap total expenditures for contract support costs.” (footnote omitted)); see also Petition for Writ of Certiorari, *supra* note 7, at 18 (“The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. As this Court explained in *OPM v. Richmond* . . . ‘[t]he general appropriation for payment of judgments *** does not create an all-purpose fund for judicial disbursement.’ The Judgment Fund exists solely to pay ‘final judgments, awards, compromise settlements, and interest and costs’ when ‘payment is not otherwise provided for.’” (internal citations omitted)).

131. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 6-41 to -42 (“In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using expired balances to liquidate or make adjustments to valid obligations recorded against that appropriation, violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek a deficiency or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary.” (footnote omitted) (citation omitted)).

it keeps the “not to exceed” language within the lump-sum discretionary spending appropriated to the agencies.¹³²

Congress can conceivably attempt full funding within the current system as is, avoiding shortfalls, but under the current system, the government has little control over the rising costs associated with contract support.¹³³ Although full funding would encourage tribes to enter into more self-determination contracts, they may have no incentive to increase efficiency.¹³⁴ Rather, they could attempt to maximize their “indirect” costs¹³⁵ because the law, after *Ramah*, assures them full funding. Eliminating that risk, however, is a problem for every solution that maintains full funding under the indirect-cost-rate system.¹³⁶

B. Appropriate on a Contract-by-Contract Basis with a Line-Item Appropriation

The Tenth Circuit suggested that Congress could shift from a lump-sum appropriation method to line-item appropriations for CSCs on a contract-by-contract basis.¹³⁷ By making the appropriations contract-by-contract, the

132. See H.R. 6091, 112th Cong. (2012) (proposed appropriations bill for the Department of the Interior and other related agencies, “[f]or expenses necessary for the operation of Indian programs . . . [including the ISDA], \$2,404,672,000, to remain available until September 30, 2014 . . . of which, notwithstanding any other provision of law, including but not limited to the [ISDA], not to exceed \$228,000,000 shall be available for payments for contract support costs”); H.R. REP. NO. 112-589, at 81 (2012) (noting with regard to the IHS: “The Committee recommends \$546,446,000 for Contract Support Costs, \$75,009,000 above the fiscal year 2012 enacted level and \$70,000,000 above the budget request. With this increase, the Committee is attempting to fund the projected shortfall so the Federal government can meet its contractual obligations. The Committee directs the Service to work with Tribes and tribal organizations to explore options for improving the transparency of current year contract support cost information, and to report back to the Committee within 90 days of enactment of this Act” and using similar language regarding the BIA); *Ramah*, 132 S. Ct. at 2195 (“Any one of the options . . . could also promote transparency about the Government’s fiscal obligations with respect to ISDA’s directive that contract support costs be paid in full.”).

133. See 1999 GAO REPORT, *supra* note 34, at 25 (finding that “barring any major changes (e.g., in the circumstances of the tribes or in the law), contract support costs will likely continue to increase in the future.”).

134. See *id.* at 56.

135. See *id.*

136. See *supra* notes 52–59 and accompanying text (describing the indirect-cost-rate system). See generally 1999 GAO REPORT, *supra* note 34.

137. See Petition for Writ of Certiorari, *supra* note 7, at 29 (interpreting the Tenth Circuit as suggesting that “if Congress wished to cap federal spending on contract support costs without amending the substantive provisions of the Act, it was required to ‘limit

tribal contractors would be on notice, having been made knowledgeable of the contracting officer's administration, and would thus not be able to recover from a shortfall in appropriations under the *Ferris* doctrine.¹³⁸ Rather, the "subject to the availability of appropriations" language would apply, and the contractor would know, as soon as the appropriation became known to him, that he was contractually entitled only to the amount actually appropriated—his contract is literally subject to the availability of the appropriated amount, which has been limited specifically by Congress in his case.¹³⁹

An advantage to such a scheme would be to eliminate shortfall liability—as Congress needs to do—while maintaining a restriction on the amount of funds agencies can provide for CSCs—as Congress wants to do. However, the practicalities of Congress ratifying hundreds of contracts may prove such a scheme untenable.¹⁴⁰ Congress provides a lump-sum appropriation to the agencies precisely because it does not want to deal with each contract; it delegates the contract-making authority and the business of negotiating contracts to the agencies for classic administrative law reasons.¹⁴¹ A line-item appropriation would require Congress to hammer

appropriations on a contract-by-contract basis' for hundreds of tribal organizations nationwide." (citation omitted); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195 (2012) ("Congress could elect to make line-item appropriations, allocating funds to cover tribes' contract support costs on a contractor-by-contractor basis.").

138. *See Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration . . ."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 6-44 ("Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts.").

139. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 6-45 ("However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit." (citations omitted)).

140. *See* 1999 GAO REPORT, *supra* note 34, at 22 ("As of December 1998, there were 556 federally recognized tribes. Agency officials estimate that nearly all of the federally recognized tribes administer at least one BIA or IHS contract either directly or as a member of a tribal consortium. Tribes may administer multiple contracts from BIA and IHS.").

141. *Cf.* Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927) (stating that administrative agencies, "subsidiary law-making bodies" to Congress and State legislatures, generally "'fill[] in the details' of a policy set forth in statutes. . . . The

out in an appropriations subcommittee each individual contract and provide a line item in the appropriations bill for each contract, all subject to congressional debate.¹⁴²

The line-item approach runs into more problems, however, when considered in light of the self-determination theory underlying the ISDA and the effect a line-item appropriation might have on tribes' willingness to contract. Tribes may shy away from the ISDA program if their only guarantee is whatever the appropriations committee, rather than the BIA or IHS, with whom they have a direct relationship, decides to give them. Moreover, the tribes' management of their programs would be contingent on federal determinations of sufficient funding, limiting tribal choices in allocating the best use of the resources they do receive. In subjecting tribes to the dictates of the federal government, such a course runs contrary to the principles and purposes underlying the ISDA.¹⁴³

C. Amend the ISDA to Eliminate the Mandate to Accept Every Qualifying Contract

Instead of changing its appropriation method, Congress could remove the ISDA provision that requires the BIA and IHS secretaries to accept every qualifying contract.¹⁴⁴ Agencies could still enter into self-determination contracts, but the law would allow them more discretion in accepting contracts, thereby controlling costs according to budget and avoiding any shortfalls in payment. In addition, Congress could maintain its restriction on CSC funding.¹⁴⁵

control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures"); Jody Freeman & Martha Minow, *Introduction* to GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 7–9, 15, 20 (Jody Freeman & Martha Minow eds., 2009) (“[T]oward the end of the twentieth century and the start of the twenty-first, federal and state governments have relied heavily on ongoing contracts with private providers for a much broader range of government functions, making contract the primary mechanism of government action, and arguably government’s most important means of control over the provision of public services.” (footnote omitted)).

142. See *supra* Part II.B.

143. See *supra* Part II.A.

144. See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195 (2012) (suggesting to Congress the option, among others, of “amending the ISDA to remove the statutory mandate compelling the BIA to enter into self-determination contracts”); 25 U.S.C. § 450f (2012) (directing the Secretary to enter into an ISDA contract upon the request of any Indian tribe).

145. See *supra* notes 81–86 and accompanying text.

However, a disadvantage to such an approach is the fact that the statutory mandate to enter into self-determination contracts is one of several essential components of the ISDA program's success. The ISDA guarantees tribes the funding for direct programs and CSCs if they submit a qualifying contract.¹⁴⁶ They do not have to bid for federal favor through a solicitation. Rather, their relationship flows from the government's trust responsibility, and entitlement to CSCs accrues whenever a tribal contractor qualifies under the ISDA rules.¹⁴⁷ This relationship makes sense in the ISDA structure because tribes are not and should not be competing for federal funding.¹⁴⁸ The ISDA is open to any and every tribe in keeping with the

146. See *Ramah*, 132 S. Ct. at 2195 (“Congress obligated the Secretary to accept every qualifying ISDA contract, which includes a promise of ‘full’ funding for all contract support costs.”); COHEN’S HANDBOOK, *supra* note 6, at 1387 (stating that an agency “may only deny a tribal request to enter into a self-determination contract if the service to the Indian beneficiaries will not be satisfactory, the contract will jeopardize the trust resources of the tribe, the tribe cannot fulfill the contract, the proposed cost is more than that permitted under the Act, or the activity is outside the scope of the Act ‘because the proposal includes activities that cannot lawfully be carried out by the contractor.’”).

147. See *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1075 (10th Cir. 2011) (“[A]s a *Ramah* plaintiff representative explained by affidavit, her tribe ‘always understood that the contract amount represents an entitlement under the Self-Determination Act, even if payment is delayed until Congress makes the necessary appropriation.’”); Petition for Writ of Certiorari, *supra* note 7, at 19 (“The court of appeals suggested at points . . . that tribes’ purported entitlement to ‘full funding’ of contract support costs irrespective of the appropriations caps springs from the ISDA itself, and at other points that such an entitlement flows from principles of contract law.” (citation omitted)); *id.* at 22 (“The Tenth Circuit has since reaffirmed this erroneous interpretation of the ISDA, holding that an Indian tribe is ‘entitled to a contract specifying the full statutory amount’ of contract support costs, and that the government is forbidden even from negotiating for the tribe’s agreement to accept a lower sum in light of the lack of available appropriations. . . . The court of appeals declared in *Southern Ute* that ‘[a] tribe cannot be forced to enter into a self-determination contract waiving its entitlement to full [contract support cost] funding.’” (citation omitted) (quoting *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1083 (2011))); see also *supra* Part II.A.

148. See *Ramah*, 132 S. Ct. at 2186 (“Congress enacted ISDA in 1975 in order to achieve ‘maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.’ 25 U.S.C. § 450a(a.)”); 1999 GAO REPORT, *supra* note 34, at 5 (“In passing the [ISDA], the Congress recognized that the government’s administration of Indian programs prevented tribes from establishing their own policies and making their own decisions about program services. The act removes that impediment”); see also 25 U.S.C. § 450(a)(1) (2012) (“[T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and

self-determination goal. Indeed, the statutory scheme exchanges the programs that the federal government would provide for ones that the tribes can provide themselves, albeit with federal funding. Removing the statutory mandate cuts at least some qualifying tribes out of the ISDA program and forces them to accept federally administered programs—exactly the practice the ISDA sought to end.¹⁴⁹

A related response is to pass a moratorium on new self-determination contracts.¹⁵⁰ This was the temporary solution Congress tried in 1998 to contain the CSC shortfalls, but it did not result in any ultimate solutions that would keep the ISDA program alive and working for tribes.¹⁵¹

D. Amend the ISDA to Eliminate the Requirement of Full Funding for Contract Support Costs

Another possibility is that Congress could simply eliminate the ISDA requirement of fully funded CSCs.¹⁵² Without a contractual or statutory guarantee of CSC funding, tribes could not subject the government to liability for a deficiency in appropriations.¹⁵³ Congress could limit its

their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government . . .”).

149. See *supra* notes 22–38 and accompanying text.

150. *Ramah*, 132 S. Ct. at 2195 (“[Congress] could also pass a moratorium on the formation of new self-determination contracts, as it has done before.”).

151. See 1999 GAO REPORT, *supra* note 34, at 2 (“In 1998, a year of concern and controversy over contract support costs culminated in a statutorily imposed 1-year moratorium for fiscal year 1999 on all new contracting under the Indian Self-Determination Act.”).

152. See *Ramah*, 132 S. Ct. at 2195 (noting that Congress “could reduce the Government’s financial obligation by . . . giving the BIA the flexibility to pay less than the full amount of contract support costs.”); 1999 GAO REPORT, *supra* note 34, at 57 (suggesting to Congress the possibility that it could “amend the act to eliminate the provision for fully funding allowable contract support costs, and, instead, provide funding strictly on the basis of annual appropriations.”).

153. 1999 GAO REPORT, *supra* note 34, at 57 (“[T]his alternative would allow the Congress to fund contract support costs at whatever level it deems appropriate. . . .[and] would eliminate the expectation . . . that full contract support funding will be available, when, in fact, appropriations and funding have been limited and have caused shortfalls.”).

liability¹⁵⁴ and force tribal contractors to accept whatever agency funds are available.¹⁵⁵

Such a course, however, would contravene the ISDA's purpose, guarantees, and provision for CSCs. Indian tribes have already become more reluctant to enter into new self-determination contracts for lack of full CSC funding.¹⁵⁶ Eliminating the guarantee of CSCs benefits the federal budget balance, but it means that the tribes continue to suffer with less than the needed funds.¹⁵⁷ Under the self-determination policy of the ISDA, Congress needs to provide full funding for the tribes so that they get the full benefit of the direct programs and their ability to administer them.¹⁵⁸

154. See Alan I. Saltman, *The Ferris Doctrine: Reaffirmed*, Nash & Cibinic Rep. (CCH), Sept. 2012, ¶ 46 (vol. 26, no. 9) (noting that if Congress amended the ISDA to give agencies "the flexibility to pay less than the full amount of contract support costs" it would "likely requir[e] the inclusion of a specific notice/limitation of liability clause in the ISDA contract").

155. See 1999 GAO REPORT, *supra* note 34, at 57 ("This alternative has the advantage of limiting the growth of contract support funding . . ."); Petition for Writ of Certiorari, *supra* note 7, at 28.

The appropriations caps imposed in [*Ramah*] reflect a judgment by Congress that, although the federal policies that are served by funding contract support costs under the ISDA are important, those policies do not warrant the unlimited disbursement of public money at the expense of other priorities, including other programs benefitting Indians and Indian tribes. Thus, the Conference Report accompanying the first capped appropriation for the BIA in FY 1994 explained that it was necessary to impose a limit because "significant increases in contract support will make future increases in tribal programs difficult to achieve."

Id. (quoting H.R. REP. NO. 103-299, at 28 (1993) (Conf. Rep.)).

"Likewise, legislators explained their decision to continue limiting the appropriations available to the Indian Health Service for contract support costs in FY 2000 on the ground that Congress 'cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes.'" *Id.* (quoting *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1306 (2010) (quoting in turn H.R. REP. NO. 106-222, at 112 (1999))).

156. See *supra* Part II.A; 1999 GAO REPORT, *supra* note 34, at 38–45 (detailing how contract support funding shortfalls have adversely affected ISDA contracting tribes).

157. See 1999 GAO REPORT, *supra* note 34, at 57–58 ("A disadvantage of this alternative is that it may discourage tribes from entering into new self-determination contracts. . . . [I]f they are not able to achieve full funding of their contract support costs, and particularly their indirect costs, they may not continue to contract for federal programs or they may reduce the number of programs they contract.").

158. See *supra* Part II.A.

E. Amend the ISDA to Limit Indirect Cost Rates

Congress could also amend the ISDA to impose limits on the indirect cost rates that agencies use to calculate the majority of CSCs.¹⁵⁹ By lowering the rate, Congress could spend less on CSCs—as it has intended to—while continuing to provide a certain amount of CSC funding.¹⁶⁰ This more balanced option has the further advantage of inducing tribes to limit their administrative and other indirect costs because they will be aware of a lower rate and thus lower availability of funds for CSCs.¹⁶¹

However, this option ignores differing tribal CSC requirements.¹⁶² While this method incentivizes tribes to run their programs efficiently, lowering the rate could cause some tribes to be unable to afford to manage ISDA contracts and also could discourage some tribes from the self-determination benefits of the ISDA.¹⁶³ In addition, this option would not eliminate the shortfall possibility because it would not change the congressional mechanism for funding CSCs.¹⁶⁴ Without a method for preventing Congress from under-appropriating, this option leaves Congress vulnerable to incurring liability for a shortfall.

F. Consolidate Direct Program Funds and Contract Support Costs in ISDA Contracts

Instead of tweaking the existing indirect-cost-rate system, the government could replace that system by consolidating CSCs with direct programs in one master contract price that covers both.¹⁶⁵ Such an approach

159. 1999 GAO REPORT, *supra* note 34, at 58 (“[Another] alternative would be to amend the law to limit the amount of funding tribes could receive for contract support by limiting the amount of indirect costs tribes can receive. For example, one way to limit funding would be to establish one indirect cost rate—such as the current aggregate rate of 25 percent—as a flat rate that would apply to all tribes. Another method would be to fund tribes’ indirect costs according to their rate, up to a specific limit, or ceiling—such as 25 percent—above which a tribe could recover no more costs.”).

160. *See id.* (noting that one advantage to limited indirect cost rates is “imposing limitations on the growth of contract support funding”).

161. *See id.* at 58–59 (noting that another advantage is to “eliminat[e] the expectation created by the law’s current language that full contract support funding will be available” (footnote omitted)).

162. *See id.* at 59 (noting how this alternative “ignores the differences among the individual tribes’ actual indirect costs” and describing these differences).

163. *See supra* notes 68–69 and accompanying text.

164. *See* 1999 GAO REPORT, *supra* note 34, at 58.

165. *Id.* at 61 (“[Another] alternative would be to amend the act to eliminate the current funding mechanism, which provides contract support funding over and above the program

would mean that tribes could negotiate an overall contract price with the agencies, including administrative and indirect costs, and the agencies could submit that price to Congress in their annual budgets.¹⁶⁶ This approach increases certainty because the government would no longer guarantee tribes CSC funds that it did not bargain for, and Congress's appropriation would cover all CSCs that it promised to pay for, as long as it covered all the contracts collectively.¹⁶⁷

Moreover, this consolidated approach is in line with the ISDA's self-determination goals because it encourages tribes to determine how best to administer their programs.¹⁶⁸ Tribes could increase administrative and "indirect" costs only by decreasing the amount they spend on direct programs. This is even more self-determinative than the existing cost structure because agencies would not have control over how tribes administered their programs—\$X for direct programs, \$Y for contract support—but would provide \$Z amount to be used at tribal discretion. Transparency would be key to making the system work, but transparency would be more likely in a simplified, consolidated contract negotiating process with the focus shifted away from CSCs.¹⁶⁹

funding, and replace it with one that would combine the current categories of contract costs into one contract amount from which both direct and indirect costs would be recovered.”).

166. *See id.* (“Upon consolidation into a single contract amount, these cost categories would lose their individual identities and would thereafter simply comprise the contract total. BIA’s and IHS’s budget requests, then, would no longer contain a separate line item for contract support; those funds would be contained within the agencies’ program line items. BIA currently uses this funding method for tribes’ contracts of construction programs.”).

167. *See id.* (“The advantage of this alternative for both the government and the tribes is that it provides for the full recovery of indirect costs, although the amount of funding provided may not increase. At the same time, this alternative removes any incentive for tribes to increase their indirect costs to receive more funding each year. Funding would no longer be provided over and above a program’s direct funding, so once the consolidated contract amount has been set, any increases in indirect costs would leave less money for a program’s expenditures.”).

168. *Id.* at 62 (“This [alternative] would create an incentive for tribes to reduce their indirect costs as much as possible, to make more money available for direct program expenditures. In keeping with the purpose of the Indian Self-Determination Act, tribes would make the decisions about how much funding to spend on program costs and how much to spend on administrative, or indirect, activities.”).

169. *Id.* (“With this alternative, the spotlight would no longer be on the sufficiency of contract support funding, but on the sufficiency of direct program funding. That is, funding debates would center on whether the funds provided for a particular program would be sufficient to achieve its intended purpose.”).

A disadvantage to a fixed consolidated contract price is that contracting tribes would have to bear the burden of increased administrative and overhead costs.¹⁷⁰ Instead of benefitting from the advantage of an increase in the indirect-cost rate, tribes would have to work within the funding limit—the contract price—to make savings on CSCs: they “would bear the responsibility for managing indirect costs prudently, to retain the greatest possible amount of the total contract funds for program services.”¹⁷¹ While this tribal-contractor responsibility comports with the ISDA’s self-determination goals, it disadvantages tribes to the extent that some of their costs are unknown and unforeseen, and it could require tribes to take a loss if their costs ultimately exceed the contract price.

Moreover, the consolidated contract price as a solution has another disadvantage: it does not address the possibility of an appropriations shortfall. Under a consolidated-cost contract, the government would not incur liability unless it under-appropriated the *consolidated* figure. If even the consolidated figure was under-appropriated, then the result of underfunding would be the same as in *Ramah*—the government would incur liability as to each contract that it underfunded when Congress appropriated enough to satisfy any one contractor but not all collectively.¹⁷²

Thus, the consolidated-cost solution fails on its own as an effective post-*Ramah* response to the shortfall issue. Along with other reforms, however, a consolidated-cost scheme could approach a solution that meets all of the necessary criteria for solving the ISDA’s funding problem.¹⁷³ The next Part discusses how the consolidated-cost approach can be combined with two other reforms—one in the appropriations method, the other in the structure of ISDA contracts—to further the ISDA’s self-determination policy goals of avoiding liability for underfunding, incentivizing tribal contractors to run programs efficiently and encouraging participation.

IV. Recommended Solutions to Strengthen the ISDA Program and Solve the Contract Cost-Reimbursement Problem

If Congress makes no changes to the ISDA funding system following *Ramah*, tribes’ CSCs could still be underfunded, but tribal contractors would get the balance of their funds relatively quickly because the

170. *Id.*

171. *Id.*; see also *infra* Part IV.C (suggesting a cure to this disadvantage by shifting away from fixed-price contracts and utilizing cost-reimbursement contracts instead).

172. See *supra* Part II.C.

173. See *supra* notes 121–24 and accompanying text.

government knows it cannot escape liability for any shortfalls.¹⁷⁴ The BIA and IHS could petition Congress for supplementary appropriations any time a tribe could show a shortfall for which the government would be liable.¹⁷⁵ The danger for the tribes is not that shortfalls would continue, but that Congress may decide to eliminate the entitlement to CSCs in order to save money in the federal budget and to avoid playing catch-up for every underfunded ISDA contract.¹⁷⁶ As Part III established, Congress could change the system to avoid paying full CSCs in a number of ways: eliminate the mandate to accept every qualifying contract,¹⁷⁷ eliminate the requirement of full funding for CSCs,¹⁷⁸ or appropriate for ISDA contracts on a line-item contract-by-contract basis.¹⁷⁹

This Part will argue for three basic reforms to the ISDA program in order to meet the criteria set out in Part III. First, Congress should authorize the appropriate federal agencies to engage in direct spending from the Treasury so that the appropriations process will not be a block to funding, and shortfalls in the ISDA contract budget will be eliminated.¹⁸⁰ Second, Congress should amend the ISDA to consolidate direct program and contract support costs, as described in Subpart III.F, allowing tribes to more fully realize the benefits of self-determination in deciding for themselves how to allocate contract funds to direct program costs and administrative and overhead expenditures.¹⁸¹ Finally, in implementing the consolidated-cost contract scheme, the BIA and the IHS should shift from fixed-price to cost-reimbursement incentive-type contracts for the tribes with either an incentive fee or an award fee to induce tribal contractors to keep costs low and run programs efficiently.¹⁸²

A. Direct Spending Authorization for ISDA Contracts

The government funds many of its programs, particularly entitlement programs, through direct spending: authorizing legislation allows agencies to obligate Treasury funds before Congress appropriates money in an annual bill.¹⁸³ Direct spending authorizations can also grant contract

174. *See supra* Part III.A.

175. *See supra* Part III.A.

176. *See supra* Part III.C–D.

177. *See supra* Part III.C.

178. *See supra* Part III.D.

179. *See supra* Part III.B.

180. *See infra* Part IV.A; *see also supra* Part II.B.

181. *See infra* Part IV.B; *supra* Part III.F; *see also supra* Part II.A.

182. *See infra* Part IV.C; *infra* Part IV.B; *see also supra* Part III.F.

183. SCHICK, *supra* note 74, at 209–10.

authority, “to incur obligations in advance of appropriations”¹⁸⁴ When the budget for a contracting agency comes up for annual appropriation, the obligated funds are beyond negotiation between Congress and the agency.¹⁸⁵

The funding for public roads provides one example of how such authorization systems work. In considering various methods of legislative control over federal spending, Robert Ash Wallace describes the federal highway pattern:

Congress enacts a federal-aid highway act authorizing federal funds for highway purposes. On the strength of the authorization, the Bureau . . . makes allotments to the States on the basis of a formula which has been prescribed by Congress in the act. The States agree to match the federal funds and proceed to let contracts for the work. After the work is completed and accepted, the federal share of the cost statement is presented to the Bureau of Public Roads. The amount appropriated by Congress for a particular fiscal year is based on the amount of the cost statements that the Bureau . . . anticipates will be presented during that period.¹⁸⁶

Under this scheme, Congress does not approve an anticipated cost of building roads; rather, it receives a number for the actual costs after performance. Although the process takes control out of the hands of Congress, “Congress apparently feels that once the Bureau of Public Roads makes a commitment to a State, based on the authorizing legislation, it must honor that commitment by providing the necessary funds.”¹⁸⁷ Despite concerns over prematurely committing federal funds,¹⁸⁸ Congress generally considers instead the expectation interest of the States and the highway contractors in receiving the anticipated funds for their actual

184. *Id.*

185. *Id.* at 212 (“Some entitlements (such as Social Security) have permanent appropriations—the mandated payments are made without annual congressional action. Most entitlement programs, however, go through the annual appropriations process, although Congress does not really control them at this stage. If the amount appropriated is not sufficient, Congress has to provide supplemental funds.”).

186. ROBERT ASH WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING 122 (1960).

187. *Id.*; see also SCHICK, *supra* note 74, at 209 (noting that the Highway Trust Fund is exempted from the Congressional Budget Act’s ban on new contract authority legislation “unless this authority is made effective only to the extent provided in appropriations acts”).

188. WALLACE, *supra* note 186, at 122–23 & n.2.

expenditures.¹⁸⁹ Wallace characterizes this as the “moral” side of appropriations, the rationale being that States and contractors need time for advance planning ahead of performance and cannot be restricted by a number set by Congress at the beginning of performance.¹⁹⁰ Money is needed at the outset, but the ultimate costs are uncertain.

Such a rationale also fits the ISDA structure and policy. Congress has promised full funding for CSCs, but these cannot be determined completely until the tribes have performed their contracts.¹⁹¹ With an advance authorization, tribes could anticipate how much they could spend on CSCs for a given period, and, once they complete performance, the government could reimburse them for their actual costs on the strength of the original authorization. Furthermore, Congress need not worry about ceding control of committing funds—they have already been committed through the ISDA promise of full funding as demonstrated by the *Ramah* litigation.¹⁹² The direct spending authorization recognizes this promise and allows the tribes and federal agencies to work together on a more effective contract cost-expenditure plan. Congress, then, can make a reimbursing appropriation for the amount actually spent in an appropriations bill.

Moreover, this method limits the possibility of shortfalls because tribes will be reimbursed for their actual expenditures, not a prediction of their potential expenditures. Thus, this funding structure would eliminate the possibility of a *Ramah*-type situation—by committing Treasury funds at the time the contract is formed—without requiring Congress to appropriate on a line-item basis. Of the above potential solutions outlined in Part III, only the line-item appropriation option discussed in Part III.B effectively eliminates the possibility of *Ramah*-type liability because under that scheme, tribal contractors could no longer take advantage of the *Ferris* doctrine in the event of a shortfall. However, that approach is impractical and may deter tribes from entering into new ISDA contracts if Congress continues to underfund the program. In contrast, a direct-spending authorization method shifts discretion from the appropriating congressional committee to the contracting agencies negotiating with tribes.¹⁹³

Thus, the self-determination policy and the uncertain nature of CSCs make this system attractive, not only for Congress in avoiding liability, but also for the tribes because it takes seriously the findings of Congress in

189. *Id.* at 123.

190. *Id.*

191. *See supra* notes 51–52, 82 and accompanying text.

192. *See supra* Part II.C.

193. *See* SCHICK, *supra* note 74, at 214–15.

passing the ISDA.¹⁹⁴ Contract support is essential for tribes to realize their self-determination goals. When CSC funding is lacking and tribes cannot maintain the resources to properly administer their programs, the beneficiaries of those programs suffer.¹⁹⁵ Those beneficiaries are the tribal members who are the beneficiaries of a special trust relationship that obligates the federal government to ensure provision of essential services.¹⁹⁶

B. Consolidate Direct Program and Contract Support Costs

As described in Subpart III.F, consolidating the direct program and contract support costs for ISDA contracts is consistent with the statute's self-determination goals for Indian tribes.¹⁹⁷ In addition, consolidation would remove Congress's ability to cap expenditures on CSCs with a "not to exceed" clause in the appropriations bill. Even if Congress shifted to a line-item appropriation,¹⁹⁸ a consolidated-cost contract would represent a single negotiated contract price rather than a dichotomy between what the secretary of the agency would otherwise have spent and indirect contract support costs. In tandem with a direct spending authorization method, however, the consolidated-cost contract plan approaches a more effective solution to the ISDA's funding problem.

Consolidating direct program costs and CSCs into one contract figure allows tribes to determine how best to create savings in administration and overhead.¹⁹⁹ Given the uncertainties of cost, however, a firm fixed price for a consolidated ISDA contract would be difficult to calculate. Moreover, under a fixed price scheme, contracting tribes would bear the burden of increased indirect costs associated with overhead and administration.²⁰⁰ Indeed, the ISDA contract-funding scheme has always run somewhat counter to the self-determination theory underlying the policy. Despite tribal "control" over the administration of various services, federal administrators have retained significant power over the tribes because they determine how much they would spend on a particular program. Federal administrators are also able to limit the reimbursement of CSCs incurred by

194. *See supra* Part II.A.

195. *See supra* notes 65–68 and accompanying text.

196. *See supra* Part II.A.

197. *See supra* Part III.F.

198. *See supra* Part III.B.

199. *See supra* Part III.F.

200. *See supra* notes 171–72 and accompanying text.

the tribes because of the relative deficiencies in tribal contractors' bureaucratic size, experience, and resources.

To allow tribes to manage their contracts more freely and to eliminate the disadvantages of the consolidated-cost structure, the government should move away from a fixed-price-plus-CSC scheme toward a cost-reimbursement-type contract that includes expenses for direct programs as well as administrative and overhead costs associated with management of the contracts. The government can then retain the advantage of induced efficiency under the consolidated-cost figure by negotiating cost-reimbursement contracts to include an incentive or award fee. The next subpart outlines this approach.

C. Negotiate Cost-Reimbursement Incentive-Type Contracts

The ISDA provision that the amount of funds "shall not be less than the appropriate Secretary would have otherwise provided for the operation of [Federal Indian services] programs"²⁰¹ appears to guarantee a substantial amount of funding. The federal government funds the ISDA, at least in part, in reference to its trust responsibility. But the wording limits direct program funds and forces tribes to manage their programs according to federal determinations about methods and specifications in order to stay within the fixed price of the contract and minimize their CSCs. This has proved difficult for tribes because CSCs can be so uncertain.²⁰²

The ability to determine how best to administer services owed to tribes, under a self-determination theory, should be allocated to the contracting tribes themselves. Thus, the government should shift from a fixed-price-based contracting scheme to cost-reimbursement-type ISDA contracts, which would obligate the government to reimburse any and all costs associated with the contract and give contracting tribes the flexibility to administer their services according to their own needs, preferences, specifications, and cost-benefit calculations.²⁰³

With the exception of construction contracts, the ISDA exempts its contracts from federal government contract regulations under the Federal

201. 25 U.S.C. § 450j-1(a)(1) (2012).

202. *See supra* notes 43–46, 65–68 and accompanying text.

203. *Cf.* JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1105 (3d ed. 1998) [hereinafter CIBINIC & NASH, FORMATION] (noting that all cost-reimbursement contracts allow contractors to stop performance when funds are expended but "must continue performance as long as funds are available until completion of the specified work.").

Acquisition Regulations System (“FAR”).²⁰⁴ Thus, the current ISDA funding scheme does not fit easily into the FAR’s framework of two broad categories of government contracts: fixed-price and cost-reimbursement.²⁰⁵ However, the FAR’s requirements for using cost-reimbursement contracts are met under the ISDA. In most acquisitions, the government prefers fixed-price contracts “[s]ince it is usually to the Government’s advantage for the contractor to assume substantial cost responsibility and an appropriate share of the cost risk” and “contract costs and performance requirements are reasonably certain.”²⁰⁶ Under the ISDA’s self-determination policy and the federal government’s trust responsibility, however, contracting tribes should not have to assume such cost responsibility and risks.²⁰⁷ Thus, cost-reimbursement contracts are more appropriate.²⁰⁸

The FAR does not permit a cost-reimbursement contract unless “[c]ircumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract” or “[u]ncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.”²⁰⁹ Although self-determination policy could be applied as a “circumstance” that does not allow for a fixed-price contract, a more promising rationale would rely on the uncertainties of past CSCs to fit the second prong of the FAR’s test for using cost-reimbursement contracts.²¹⁰

To curb potential wasteful spending under such cost-reimbursement contracts, the government could negotiate an incentive fee or an award fee that would reward tribes for efficient management of their services.²¹¹ An

204. 25 U.S.C. § 450j(a)(1) (2012). *See generally* 48 C.F.R. §§ 1.101-09 (2013). Title 48 of the Code of Federal Regulations contains the Federal Acquisition Regulations System.

205. *See* 48 C.F.R. § 16.101 (2013) (delineating the range of government contract types).

206. 48 C.F.R. § 16.401(c) (2013).

207. *See supra* Part II.A.

208. *See* CIBINIC & NASH, FORMATION, *supra* note 203, at 1104 (noting that the “nature of the work or the unreliability of the cost estimate” are the determining factors for choosing a cost-reimbursement contract over a fixed price contract); *see also* JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST-REIMBURSEMENT CONTRACTING 56 (3d. ed. 2004) [hereinafter CIBINIC & NASH, CONTRACTING] (“The [cost-plus-incentive-fee] contract is used when it is appropriate to impose some risk on the contractor without requiring that the contractor fully assume pricing risks.”).

209. 48 C.F.R. §§ 16.301-2(a)(1)-(2) (2013).

210. *See supra* notes 57-58, 82-83 and accompanying text.

211. *See* 48 C.F.R. §§ 16.405-1, 16.405-2 (2013); *see also* CIBINIC & NASH, CONTRACTING, *supra* note 208, at 56 (“The [cost-plus-incentive-fee] contract is an objective incentive where the parties include a formula in the contract to determine the profit earned

incentive-fee contract rewards a contractor in proportion to the amount it is able to stay below a target cost according to a negotiated “target cost, a target fee, minimum and maximum fees, and a fee adjustment formula.”²¹² The FAR specifies that a “cost-plus-incentive-fee contract is appropriate for services . . . when . . . [a] cost-reimbursement contract is necessary”²¹³—as shown above due to uncertainties in cost²¹⁴—and when “[a] target cost and fee adjustment formula can be negotiated that are likely to motivate the contractor to manage effectively.”²¹⁵

Similarly, an award-fee contract motivates a contractor to manage costs efficiently through “an award amount that the contractor may earn in whole or in part during performance that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance.”²¹⁶ With few requirements, the government has sole discretion over determining the amount of the award fee and is responsible for carrying out an oversight evaluation of contract performance according to predetermined criteria.²¹⁷ Such agreements have been used primarily for service contracts, and the award fee’s popularity as an incentive-inducing device has grown with increased usage.²¹⁸

Either cost-reimbursement incentive or award-fee contracts could be used to motivate tribes toward efficiency and thereby help to alleviate congressional concerns that tribes will spend their funds wastefully. In keeping with the ISDA’s self-determination goals, such contracts allow tribes to determine how best to manage their costs in providing essential services, and tribes can be rewarded for pursuing their goals with well-organized, competent, and resourceful performance.

by the contractor based on the actual performance results achieved.”); *id.* at 81 (“The [cost-plus-award-fee] contract is used when the agency wants to include some profit motivation in the contract but does not have sufficient information to establish firm cost, performance, or delivery targets at the beginning of contract performance.”).

212. 48 C.F.R. § 16.405–1(a).

213. *Id.* § 16.405–1(b)(1); see CIBINIC & NASH, CONTRACTING, *supra* note 208, at 57 (noting that cost-plus-incentive-fee contracts are “particularly appropriate for services or development and test programs, but [have] been used in many other contracting situations as well.”).

214. See *supra* note 210 and accompanying text.

215. 48 C.F.R. § 16.405–1(b)(1).

216. 48 C.F.R. § 16.405–2.

217. 48 C.F.R. § 16.401(b)(2)–(3).

218. CIBINIC & NASH, CONTRACTING, *supra* note 208, at 82.

V. Conclusion

The federal government's Indian self-determination program benefits hundreds of Indian tribes and thousands of tribe members who now participate in the control of services such as health care, education, and law enforcement. The tribes' self-determination goals should remain an important priority of the federal government, which has an obligation, in the words of the ISDA, "to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."²¹⁹ Fulfilling that obligation was the promise of the ISDA and its later-included provisions for contract support costs to ensure that the program truly worked for the tribes and their members.

After the *Ramah* decision, Congress must acknowledge that the government is liable for any shortfalls in the CSC budget. Rather than radically limit the ISDA's provisions and break its promises, Congress should strengthen the self-determination program by ensuring that all allowable CSCs are paid for.

With a direct spending authorization of contract authority for agencies, Congress can make sure that tribes have the funding they need to provide and administer services to their members. By consolidating direct program and contract support costs, the government can allow tribes to determine for themselves how to manage the funding they do receive. Finally, by utilizing cost-reimbursement incentive-type contracts, the government can induce tribes to manage their programs efficiently.

The recommendations in this Note are not exhaustive remedies to the problem left after *Ramah*, but they are a first step toward strengthening the government's promise to contracting tribes and ensuring that they receive the support they expect, to which they are entitled, and which the government has promised to provide.

219. 25 U.S.C. § 450a(a) (2012).