

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. ARGUMENT	1
A. In Each of the Fiscal Years at Issue IHS Had a Contractual Obligation to Pay ASNA’s Full Contract Support Cost Requirement, as Determined by IHS, Subject Only to the “Availability of Appropriations.”.	1
1. The Facts.	2
2. ASNA’s Contracts Required IHS to Pay ASNA’s Full CSC Requirements, Not Some Lesser Amount	6
3. If a Provision of ASNA’s Contracts Limited IHS’s Duty to Pay, the Limitation Would be Contrary to Law and Thus Unenforceable.	10
4. <i>Cherokee III</i> Is Directly Controlling and Cannot Be Distinguished.	14
B. IHS’s Obligation to Pay ASNA’s Full Contract Support Cost Requirement, as Determined by IHS, was not “Discharged by Reconciliation.”.	18
1. The Facts.	18
2. The Doctrine of “Account Stated” Does Not Bar ASNA’s CSC Claims.	20
II. CONCLUSION	23
LIST OF EXHIBITS	26

TABLE OF AUTHORITIES

CASES, ADMINISTRATIVE DECISIONS & COMPLAINTS

<i>Appeals of Seldovia Village Tribe</i> , Nos. 3862-3863, 03-2 B.C.A. (CCH) ¶ 32,400, at *160,377, 2003 WL 22422891 (Oct. 20, 2003)	<i>passim</i>
<i>Beta Systems, Inc. v. United States</i> , 838 F.2d 1179 (Fed. Cir. 1988)	11, 14
<i>Cherokee Nation v. Leavitt</i> , 543 U.S. 631 (2005) (<i>Cherokee III</i>)	<i>passim</i>
<i>Cherokee Nation v. United States</i> , No. 99-092-S CIV (E.D. Okla. July 24, 2006) (Dkt. No. 190)	15
<i>Cherokee Nation v. United States</i> , 190 F. Supp. 2d 1248 (E.D. Okla. 2001)	15
<i>Chris Berg, Inc. v. United States</i> , 426 F.2d 314 (Ct. Cl. 1970)	12
<i>City of St. Petersburg v. Meyers</i> , 55 F.2d 810 (5th Cir. 1932)	20
<i>George S. Colton Elastic Web Co. v. White</i> , 23 F. Supp. 761 (D. Mass. 1938)	21, 22
<i>In re Cherokee Nation</i> , Nos. 3877-3879, 99-2 B.C.A. (CCH) ¶ 30,462, at *150,488, 1999 WL 440045 (June 30, 1999)	9, 22
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 361 F. Supp. 2d 237 (S.D.N.Y. 2005)	22
<i>In re Rockefeller Center Props.</i> , 266 B.R. 52 (S.D.N.Y. 2001)	21
<i>In re Seldovia Village Tribe</i> , Nos. 3862-3863, 05-2 B.C.A. (CCH) ¶ 33034, at *163,727, 2005 WL 1805664 (July 26, 2005)	17
<i>LaBarge Products, Inc. v. West</i> , 46 F.3d 1547 (Fed. Cir. 1995)	12
<i>Leather Mfrs.’ Bank. v. Morgan</i> , 117 U.S. 96 (1886)	22
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993)	13
<i>MAPCO Alaska Petroleum, Inc. v. United States</i> , 27 Fed. Cl. 405 (1992)	11
<i>Murray v. City of Charleston</i> , 96 U.S. 432 (1877)	9
<i>Nelson v. Chicago Mill and Lumber Corp.</i> , 76 F.2d 17 (8th Cir. 1935)	20
<i>Perkins v. Hart</i> , 24 U.S. 237 (1826)	22
<i>Pueblo of Zuni v. United States</i> , No. CV 01-1046 (D.N.M. Oct. 11, 2006) (“ <i>Zuni</i> ”)	15
<i>Ramah Navajo Chapter v. Lujan</i> , 112 F.3d 1455 (10th Cir. 1997)	13
<i>Reich v. Youghiogheny and Ohio Coal Co.</i> , 858 F. Supp. 1381 (S.D. Ohio 1994)	22
<i>Rough Diamond Co. v. United States</i> , 351 F.2d 636 (Ct. Cl. 1965)	12

Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, (D. Or. 1997) (“*Shoshone I*”) . . . 4, 22

Shoshone-Bannock Tribes v. Leavitt, 408 F. Supp. 2d 1073 (D. Or. 2005)

 (“*Shoshone IV*”), reinstating judgment under Rule 60(b) 8, 17

Thompson v. Cherokee Nation, 334 F.3d 1075 (Fed. Cir. 2003) (“*Cherokee II*”) 4, 16

United States v. Winstar Corp., 518 U.S. 839 (1996) 9

STATUTES

25 U.S.C. §§ 450-458aaa-18 (Indian Self-Determination Act) *passim*

25 U.S.C. § 450a(b) 12

25 U.S.C. § 450j-1 8

25 U.S.C. § 450j-1(a) 7, 8, 10, 12, 14

25 U.S.C. § 450j-1(a)(1) 14

25 U.S.C. § 450j-1(a)(2) 7, 8, 10, 14

25 U.S.C. § 450j-1(a)(3) 7, 8, 10

25 U.S.C. § 450j-1(a)(5) 7, 10

25 U.S.C. § 450j-1(g) 7, 10, 12

25 U.S.C. § 450j-1(d)(2) 12, 14

25 U.S.C. § 450n(2) 13

25 U.S.C. § 1601(a) 13

Indian Self-Determination Amendments of 1988, Pub. L. No. 100-472, 47

 102 Stat. 2285 (1988), formerly reprinted at 25 U.S.C. § 450f note (1988) 13, 15

Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413,

 108 Stat. 4250 (1994) 13, 15

RULES

Fed. R. Civ. P. 56(f) 13

LEGISLATIVE MATERIALS

S. REP. NO. 100-274 (1987) 12

OTHER AUTHORITIES

11 WILLISTON ON CONTRACTS § 33:1 (4th ed. 2006) 14
29 WILLISTON ON CONTRACTS § 73.61 (4th ed. 2006) 21, 22
Defendants’ Opp. to Plaintiff’s Mtn. for Class Certification, at 37-38, Dkt. No. 306,
Pueblo of Zuni v. United States, No. CV 01-1046 (D.N.M. Sept. 1, 2006) 23

obligations are at an end once IHS pays ASNA the sum of \$504,255.² This deceptively simple formulation makes no sense, for it amounts to nothing more than the proposition that the contract obligation is whatever IHS says it is as it periodically elects to amend the contract.

1. The Facts.

We begin with the relevant facts.

For fiscal year 1996, IHS and ASNA agreed that ASNA's annualized CSC requirement to operate IHS's Barrow Hospital under ASNA's new contract was \$2,301,842 (and not \$504,255). This was ASNA's CSC requirement as IHS determined it to be pursuant to IHS's CSC Circulars, and this is the same amount that was recorded as ASNA's CSC requirement for this "new and expanded" contract in every IHS Queue list spanning fiscal years 1996 to 1998. ASNA S.J. Mem. at Exh. 15 (sample Queues, listing "Arctic Slope" on pp. 3, 5 & 8). This is also the amount the parties "negotiated and agreed on":

The [contract support] costs enumerated below have been negotiated and agreed on with the Area Office of the Alaska Native Health Service and the Office of Tribal Activities of the IHS Headquarters in Rockville, MD. The costs enumerated below were included in the ASNA proposal submitted to [IHS Alaska Area Director] Mr. Ivey on January 6, 1995. Mr. Ivey approved these costs and forwarded them to OTA on March 20, 1995.

AR 3, at p. 52 (ASNA CSC budget) (*italics omitted*).³ This is also the amount the parties understood constituted "full funding" of ASNA's CSC requirement. *See* AR 14, at p. 2 (Letter from Christopher Mandregan, Jr., IHS Area Director, to Eben Hopson, Jr., ASNA Exec. Dir. (Apr. 2, 1998)) agreeing to take into consideration ASNA's request for CSC funding associated with a contract amendment

² *See* AR 3, at 19-20 (specifying \$100,000 in ASNA's FY 1996 Annual Funding Agreement ("AFA")); at 22-23 (adding \$400,000 by Amendment No. 1 to the AFA); and at 99 (adding \$4,255 by Amendment No. 6 to the AFA).

³ *See also* IHS Dec. 5, 2006, submission to the Board of previously-omitted portions of the record at p. vi (explaining and summarizing CSC amount).

to operate IHS's dental program "after full funding, i.e. \$2,301,842, is received by ASNA from the ISD fund in either FY98 or FY99") (emphasis added)).

But in fiscal year 1996 IHS represented to ASNA that IHS had no appropriations available to pay ASNA these contract support costs. ASNA Exh. 20, Aff. of E. Hopson at ¶¶ 5 & 7. As history and much litigation would ultimately show, IHS's representation was not true. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee III*). Still, that is what IHS represented to ASNA and what ASNA therefore understood. Despite the representation that IHS had no ISD Fund money for contract support costs, IHS placed into ASNA's contract a two-part, so-called "nonrecurring" payment of \$500,000, to be used for CSCs (drawn from funds at the IHS Area Office, rather than IHS Headquarters-managed funds used for CSCs associated with "new and expanded" contracts). ASNA Exh. 22, Aff. of L. Olson at ¶ 7. This was a take-it-or-leave-it proposition. One portion of this small amount was specified in the 1996 Annual Funding Agreement, and the balance was added by Amendment No. 1. *Supra* at 2 n.2. For reasons nowhere explained, IHS later added \$4,255 in CSC funding. *Id.*

A similar scenario unfolded each successive year: IHS never added to ASNA's contracts what IHS recognized and "approved" as ASNA's "full funding, i.e. \$2,301,842" for its CSC requirement – but only various so-called "non-recurring" and unpredictable lesser amounts that IHS chose to add into ASNA's annual AFAs from time to time and from diverse sources. According to Aples' Opp. S.J. Mem. at 13-17, the later sums were \$665,560 in FY 1997 (including one payment made after the fiscal year was over); \$2,136,833 in FY 1998; \$1,293,681 in FY 1999; and \$3,058,591 in FY 2000 (by which point ASNA's CSC requirement, as determined by IHS under its CSC Circulars, had been revised to \$3,667,284, *see* ASNA Exh. 16).

IHS's response to ASNA's continual requests for "full funding" of its CSC requirement was clear: IHS would add to ASNA's contract ASNA's full CSC requirement only if IHS determined that appropriations were "available" to do so – something that never occurred. Otherwise, the amounts placed into the contract were unpredictable and apparently set at IHS's whim. Thus, whereas from time to time ASNA would ask about the "availability" of CSC funding (*e.g.*, AR 12, at p.1, Letter from Eben Hopson, Jr., ASNA Exec. Dir., to Duff Pfanner, IHS Alaska Area Project Officer, (Oct. 10, 1995) asking about "the availability of FY96 ISD funding") and ASNA would demand additional CSC funding over what had been placed in the contract (*e.g.*, AR 13, at p. 2, Letter from Eben Hopson, Jr., ASNA Exec. Dir., to David J. Schraer, M.D., IHS Alaska Area Dir., (Apr. 14, 1997) concluding "We would be appreciative of any additional CSC funding that IHS can make available"), IHS would answer that more of ASNA's CSC requirement would be coming only "if" funds were available – but, regrettably (so IHS asserted) none ever were:

In reference to your letter dated April 14, 1997 (Subject: FY97 Contract Support Costs Shortfall), we are aware of ASNA's need for additional Contract Support Costs funds. If at all possible, given available funds, we will provide additional indirect shortfall funds toward the latter part of this fiscal year.

AR 13, at p. 3, Letter from David J. Schraer, IHS Acting Area Dir., to Eben Hopson, ASNA Exec. Dir., (Apr. 21, 1997). Of course, IHS knew that its entire lump-sum appropriation was legally available to pay these costs in fiscal year 1997, as it had been in 1996 (and as it admitted in the *Cherokee II*, *Cherokee III* and *Shoshone-Bannock* litigation)⁴, but that is not what IHS told ASNA. It knew that funds were "available" and that paying ASNA in full was therefore "possible," but still

⁴ See *e.g.*, *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-638 (2005) ("*Cherokee III*"); *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1089 (Fed. Cir. 2003) ("*Cherokee II*"); *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1330 (D. Or. 1997) ("*Shoshone I*") (all noting IHS's admissions that appropriations to pay "new and expanded" contract support costs were not limited by the ISD Fund language.

the balance was never paid.

The next year, 1998, IHS again mis-represented the status of its appropriation as permitting only funds from IHS's "ISD Fund" to be used to pay ASNA's CSC requirement for operating the Barrow Hospital:

This is to acknowledge receipt on March 30, 1998 of a copy of your letter to Mr. Ron Demaray, Director Division of Self-Determination Services, regarding the Arctic Slope Native Association (ASNA) request for Indian Self-Determination (ISD) funds for indirect and direct contract support costs.

I made a recent inquiry to Indian Health Service (IHS) Headquarters regarding the availability of ISD funds. As of this date, the Alaska Area cannot confirm that such funds are or will be available during FY 98. It is our understanding that the FY 98 distribution of ISD funds has not been finalized. We certainly hope that ISD funds can be awarded to the Arctic Slope Native Association (ASNA) sometime in the future. However, until the actual award of ISD funds we cannot authorize and do not recommended [sic] expenditures in advance of receiving such funds.

I will let you know as soon as we have confirmation of the distribution of ISD funds by IHS Headquarters.

AR 14, at p. 4, Letter from Duff Pfanner, IHS Alaska Area Project Officer, to Eben Hopson, ASNA Exec. Dir., (Apr. 6, 1998). As is evident from IHS's later decision to use unspent "CHEF" funds to pay some of ASNA's CSC requirement (AR 25, at p. 9), this was simply untrue. Additional funds were available to pay ASNA, and it was not a matter of grace but a matter of right.

In sum, since before the first contract between the parties was even signed, and continuing each year thereafter, IHS and ASNA agreed on the precise amount of ASNA's "full funding" for its CSC requirement. They also agreed that this entire requirement was to be fully paid under each contract so long as appropriations were "available" to do so. But during this same period, IHS repeatedly represented to ASNA, incorrectly, that sufficient appropriations were not "available" for this purpose, and on this incorrect basis IHS added to ASNA's annual AFAs various sums that were

always less than ASNA's "full funding" amount. That IHS has actually paid these lesser sums does not excuse IHS's conduct, nor convert what IHS said it could pay into the maximum amount that IHS was required to pay.

2. ASNA's Contracts Required IHS to Pay ASNA's Full CSC Requirements, Not Some Lesser Amount.

Until this appeal IHS argued that it did not need to pay ASNA's full CSC requirement because there were insufficient appropriations available to pay more, or else because it has discretion not to pay more. But after *Cherokee III*, which resoundingly rejected these arguments, IHS's newly-minted position is that it is not obligated to pay ASNA's full CSC requirement after all, even when appropriations are available to do so, and that IHS need only pay the lesser sums IHS added to ASNA's periodic contract modifications. For instance, IHS claims that ASNA's 1996 contract modifications only required it to pay approximately \$504,255, because that is all that IHS specified in the contract amendments. This contention is demonstrably wrong, at odds with the contract terms (including the ISDA), and precluded by *Cherokee III* and the IBCA's decision in *Appeals of Seldovia Village Tribe*, Nos. 3862-3863, 03-2 B.C.A. (CCH) ¶ 32,400, at *160,377, 2003 WL 22422891 (Oct. 20, 2003).

ASNA's 1996 contract is reproduced in the record at AR 3.⁵ The contract recites that "[t]he provisions of Title I of the [ISDA] are incorporated in this agreement." AR 3, at p. 34 (art. I, sec. 1) (concluding sentence).⁶ The contract recites that "[e]ach provision of the [ISDA] and each

⁵ At AR 3, pp. 1-18, appears ASNA's original fiscal year 1996 contract. At AR 3, pp. 31-48, appears the substitute contract the parties negotiated thereafter to replace the original contract (signature pages missing). References here are to the replacement contract, although on the points noted here in text the two contracts are identical.

⁶ See also AR 25, at p.13 (IHS "contract award") (executed by IHS on January 12, 1996 with an "Effective Date" of Oct. 1, 1995) ("this Contract is hereby awarded pursuant to the Indian Self-Determination and Education Assistance Act (P.L. 93-638, as amended); 25 U.S.C. 450 et seq.; which Act is hereby incorporated into this contract.") (emphasis added).

provision of this Contract shall be liberally construed for the benefit of ASNA” *Id.* (art. I, sec. 2(B)). The contract recites (by virtue of the “incorporation” provision) that “the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]” (and not some lesser sum). 25 U.S.C. § 450j-1(g) (emphasis added). The contract recites, again by virtue of the “incorporation” provision, that “[t]here shall be added ... contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management,” 25 U.S.C. § 450j-1(a)(2) (emphasis added) – again, not some lesser sum that is insufficient to cover these costs. These CSCs are part of “[t]he amount of funds [to be] provided under the terms of self-determination contracts.” *Id.* By virtue of the “incorporation” provision, the contract even recites in detail the particular costs that the required CSCs “shall include.” *Id.* §§ 450j-1(a) (3), (5). Lest there be any doubt in the matter, ASNA’s Contract expressly recites that the “total amount” that the Secretary “shall make available to ASNA” “shall not be less than the applicable amount determined pursuant to [25 U.S.C. § 450j-1(a)] of the [ISDA].” AR 3, at p. 36 (art. II, sec. 4) (emphasis added). And again, the contract recites that all these provisions must be “liberally construed” in ASNA’s favor. AR 3, at p. 34 (art. I, sec. 2(B)).

Given these contract terms, together with the statutory command incorporated into ASNA’s contract to construe all terms in ASNA’s favor – ASNA’s 1996 contract must be read to obligate IHS to pay the full amount of ASNA’s CSC requirement, at least when Congress appropriates funds that are legally available to pay that requirement. In this larger context, the reference to lesser amounts in various payment documents must be construed as partial commitments against the duty to pay that full contract obligation, because the overriding mandatory obligation stated in the

contract is to pay “not ... less than the applicable amount determined pursuant to [25 U.S.C. § 450j-1(a)] of the ISDA” (AR 3, at p. 36 (art. II, sec. 4)), and in 1996 that annualized amount – the parties here agree – was \$2,301,842. This is precisely how ASNA understood the contract, (ASNA Exh. 20, Aff. of E. Hopson at ¶¶ 5 & 7) and even how IHS’s representative in 1996 understood it (ASNA Exh. 22, Aff. of L. Olson at ¶ 8). Later years’ contracts likewise made clear the IHS was obligated to pay the full amount of ASNA’s contract support cost requirement, subject only to the ISDA’s “availability of appropriations” condition on such payments.⁷

The conduct of the parties bears out this reading. At the beginning of each contract year IHS paid a given sum, such as \$500,000 in each of fiscal years 1996 and 1997. But in subsequent months IHS made additional CSC payments – \$4,255 just before the end of FY 1996 (AFA Amend. No. 6, AR 3, at 99), and \$165,560 two months after the close of FY 1997 (AFA Amend. No. 11, AR 4, at 11). The payment of additional sums is only consistent with a mutual understanding that the underlying contract obligation was for the full CSC requirement, and that from time to time IHS was

⁷ For instance (and in addition to the relevant statutory provisions), the “Restated Compact” and the “Amended and Restated Compact” adopted for FY 1998 and FY 1999, respectively, each declared that “The total amount of funds ... that the Secretary shall make available to the Co-Signers shall be determined in accordance with § 303(a)(6) of Title III” See AR 5, at p. 22, and AR 7, at p. 25 (art. III, sec. 2 in both documents). The referenced § 303(a)(6) of Title III to the ISDA, as added by Pub. L. 100-472 (now repealed), required that amounts paid under contracts be not less than the amounts due self-determination contracts under 25 U.S.C. § 450j-1(a). Further, the FY 1998 and FY 1999 AFAs each cautioned that “Pursuant to [§ 450j-1(a)(2)] of the [ISDA], Co-Signer [ASNA] shall receive contract support as defined in sections [450j-1(a)](2) and (3).” See AR 6, at p. 8, and AR 8, at p. 8 (sec. 4(b) in both documents). The 1999 AFA, executed after IHS had suffered twin defeats before this Board in the *Cherokee* case and before the district court in the *Shoshone-Bannock* Oregon litigation, further cautioned: “Nothing in this provision shall be interpreted to waive the ASNA’s right to be paid the contract support costs to which it is entitled in accordance with [§ 450j-1(a)(2)] of the [ISDA],” see AR 8, at p. 8 (sec. 4(b) (emphasis added)), a provision repeated almost verbatim in the FY 2000 AFA. See AR 10, at p. 8 (sec. 4(b)) (“Contract support cost funding is calculated and paid under this AFA in accordance with Section [450j-1] of the [ISDA], as amended, and subject to any legal requirements imposed by Congress. If the amount appropriated by Congress for contract support costs for the year covered by this AFA is equal to the amount appropriated for the prior year, contract support costs in the amount paid in FY 99, annualized for 12 months, will be available under this AFA, If Congress appropriates a greater amount for contract support costs for the year covered by this AFA, additional contract support cost funds will be provided pursuant to Section [450j-1] of the [ISDA], as amended. Nothing in this provision shall be interpreted to waive the Co-Signer’s right to be paid the contract support costs to which it is entitled in accordance with section [450j-1(a)(2)] of the [ISDA], as amended.”) (emphasis added).

making partial payments against that requirement. The fact that IHS recorded the full CSC requirement in annual shortfall reports further supports this understanding. (The alternative – that the contract amount is only what IHS declares it to be in its sole discretion, as it chooses to add or not to add funding – would render the whole notion of a contract “an absurdity.” *Murray v. City of Charleston*, 96 U.S. 432, 445 (1877) (“a promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity”) (quoted in *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J. concurring)). It is the quintessential “illusory promise,” *Winstar*, 518 U.S. at 921 (Scalia, Kennedy & Thomas, JJ. concurring).)

The IBCA construed the ISDA and the Cherokee Nation’s three annual contracts in precisely the manner ASNA advances here. *In re Cherokee Nation*, Nos. 3877-3879, 99-2 B.C.A. (CCH) ¶ 30,462, at *150,488, 1999 WL 440045 (June 30, 1999). The Board held that the contracts required payment of the contractor’s full CSC requirement, as determined by IHS pursuant to IHS’s CSC circulars, without ever considering the lesser sums either mentioned in the Cherokee Nation’s various funding agreements or paid pursuant to those agreements and their diverse amendments. As discussed *infra* at 14-15, so, too, did the Supreme Court construe a fourth Cherokee contract, notwithstanding that the lesser dollar amount of CSCs mentioned in the subject contract had been paid. Just as the IBCA noted in *Seldovia*, ASNA’s situation “has no significant differences from *Cherokee*.” *Appeals of Seldovia Village Tribe*, at *160,343.

In sum, each of ASNA’s contracts required IHS to pay ASNA’s full contract support cost requirement. The duty to pay those costs was only limited in circumstances where, and to the extent that, appropriations to make those payments were not legally available. Lesser payments were merely payments against that larger obligation. IHS’s contrary position now that the smaller sums

IHS actually paid set the limit of its legal obligations must fail. As one of the contracts noted, “Nothing in this provision shall be interpreted to waive the Co-Signer’s right to be paid the contract support costs to which it is entitled in accordance with section [450j-1(a)(2)] of the [ISDA], as amended.” AR 10, at p.8 (sec. 4(b)).

3. If a Provision of ASNA’s Contracts Limited IHS’s Duty to Pay, the Limitation Would be Contrary to Law and Thus Unenforceable.

There is an alternative formulation, but the alternative leads to the same result. This formulation is that if the terms of the AFA amendments which collectively placed only \$504,255 into the 1996 Contract (and similar insufficient sums in later years) are indeed conclusive (and, again, we submit they are not) then those terms are illegal and thus unenforceable against ASNA.

The illegality stems from several sources, not the least of which is the statutory command of 25 U.S.C. § 450j-1(g) (incorporated into the Contract by art. I, sec. 2(A), *see* AR 3, at p. 34), that upon the approval of a contract the Secretary “shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)],” a sum which includes the “full amount” of contract support costs specified in §§ 450j-1(a)(2), (3) & (5). *See* AR 6, at p. 8 *and* AR 8, at p. 8. Thus (for instance), since the “full amount” of ASNA’s annualized CSCs was, as IHS admits, \$2,301,842, and not \$504,255 (paid in 1996) or \$665,560 (paid in 1997), any limitation in the AFAs and their amendments to these lesser sums would be illegal. (The same argument applies to the other years’ contracts.) Construing ASNA’s contracts in this alternative manner – as having in each an illegally restrictive provision – is necessary given the uniquely specific statutory command requiring that “full” CSCs “shall” be “add[ed]” to each contract, and not some small fraction that is unilaterally set and then changed at IHS’s discretion. (Again, ASNA does not believe that, fairly

read, the contract documents reflect any such restriction on the obligation to pay ASNA's full CSC requirement, and only advances this argument to respond to IHS's contrary position.)

In *Appeals of Seldovia Village Tribe*, the IBCA construed in precisely this way an ISDA contract provision that IHS asserted countermanded the duty to pay full CSC requirements, finding the provision if so construed to be illegal and unenforceable. *See id.* at *160,338-*160,339 (rejecting IHS's contention "that Seldovia legally contracted away its entitlement to full CSC payments when it signed its Annual Funding Agreement"). At issue (among other provisions), were provisions of the same Restated Compact as at issue here for FY 1998 (an umbrella agreement covering most Alaska contractors) – provisions that were repeated in ASNA's Amended and Restated Compact for FY 1999 and FY 2000 (*see supra* at 8 n.7).

The Board in *Seldovia* responded "We agree" to the proposition that "The government cannot contractually force the Tribe to accept less than full CSC's when the Tribe is entitled to full CSC's by law." *Seldovia* at *160,342 (citing *MAPCO Alaska Petroleum, Inc. v. United States*, 27 Fed. Cl. 405 (1992)). The Board further "agree[d]" with the proposition that "the Government cannot lawfully benefit from a contract provision contrary to law." *Id.* (citing *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988)).

The Board's citation to *MAPCO* was particularly apt, for there (as in *Seldovia* and here) the government sought to rely on contract language to pay less than was mandated by law – except that in *MAPCO* the higher formula was merely stated in a procurement regulation, whereas here the higher formula is stated directly in a statute. As *MAPCO* held, "When a contract clause drafted by the government is inconsistent with law" – here, the FY 1996 AFA amendments totaling only \$504,255, and similarly insufficient modifications in later years – "whether the [contractor]

inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand.’” 27 Fed. Cl. at 416 (citation omitted). In like circumstances, reformation has been the remedy to relieve the contractor from suffering the illegal provision. *See Chris Berg, Inc. v. United States*, 426 F.2d 314, 317 (Ct. Cl. 1970) (reforming contract to add \$41,000, although contract was performed as bid, where clause later found to violate procurement regulations); *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995) (reforming contract, although contractor initially complied, where clause later found to be illegal).

Indeed, an illegal contract provision is particularly abhorrent when the government seeks to impose it upon a contractor who is one of the intended beneficiaries of the statute at hand, *Rough Diamond Co. v. United States*, 351 F.2d 636, 640 (Ct. Cl. 1965) (discussing “ship-sales” line of cases where, because Congress set a formula “for the benefit of the purchasers” contract provisions setting a different price were illegal and purchasers could recover damages). Here, if the ISDA is anything it is a statute intended “for the benefit” of Tribal contractors and they are “[t]he class Congress had in mind” when it crafted the Act’s contract support cost provisions (*id.*). *See* ASNA S.J. Mem. at 6-8 (discussing ISDA); 25 U.S.C. § 450a(b). After all, “the single most serious problem” giving rise to the ISDA’s rewrite in 1988 and to the enactment of the ISDA’s contract support cost provisions was “the failure of the [BIA] and [IHS] to provide funding for the indirect costs associated with self-determination contracts,” S. REP. NO. 100-274, at 8 (1987), a fact that did not escape the Supreme Court:

The Act seeks greater tribal self-reliance brought about through more “effective and meaningful participation by the Indian people” in, and less “Federal domination” of, “programs for, and services to, Indians.” § 450a(b). The Act also reflects a congressional concern with Government’s past failure adequately to reimburse tribes’ indirect administrative costs and a congressional decision to require payment of those costs in the future. *See, e.g.,* § 450j-1(g); *see also* §§ 450j-1(a), (d)(2).

Cherokee III, 543 U.S. at 639 (emphasis added). Thus, even under an alternative formulation where the contract terms are construed as unambiguously permitting the payment of less than ASNA’s full CSC requirement – and as noted earlier ASNA does not believe the contracts can be so read – the provision is illegal and cannot be permitted to stand.

In sum, IHS’s duty under ASNA’s contracts, including all of the statutory terms of the ISDA that are expressly incorporated into the contracts, together with the mandatory rule to “liberally construe” the contracts for ASNA’s benefit, is to pay no less than the “full amount” of the CSC requirement that IHS determined under the CSC Circulars, and which IHS dutifully recorded in its “Queue” reports and annual shortfall reports. The references from time to time to lesser amounts being paid in the various funding agreement amendments are subsidiary to these overriding statutory and contractual provisions – essentially payments on the claim – or else they are simply illegal and on that account unenforceable. In either event, the specification of \$504,255 in the 1996 AFA amendments, \$665,560 in the 1997 AFA amendments, and similarly insufficient funds in subsequent years does not limit IHS’s liability for ASNA’s full CSC requirement. It is not a matter of “mutat[ing]” the contracts as ASNA would wish them to be (Aples’ S.J. Opp. at 23), but of enforcing them as Congress required them to be – precisely because in years past IHS had deliberately underpaid Tribal contract support cost requirements, *see* ASNA S.J. Mem. at 3-6 (discussing history leading to the 1988 and 1994 ISDA amendments on CSC issues).⁸

⁸ There is yet a third possible formulation (as least theoretically): that the contracts’ terms on the CSC issue are ambiguous. But that formulation is not realistic, since the Act and the contracts both command that all terms (presumably including ambiguous terms) are to be “liberally construed” in ASNA’s favor. So, too, the common law “Indian Rule” of statutory construction commands that “federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.” *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citations omitted). The Rule is particularly apt here, where IHS represents the United States as trustee for ASNA and its member Tribes and is administering Indian trust services, *see* 25 U.S.C. § 1601(a); *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (acknowledging trust relationship), and where ISDA contracts leave that “trust responsibility” unimpaired (25 U.S.C. § 450n(2)). Nonetheless, if the Board should somehow find an ambiguity that

4. Cherokee III Is Directly Controlling and Cannot Be Distinguished.

IHS next argues that the Supreme Court in *Cherokee III* never considered whether IHS should be held liable for failing to pay full CSC requirements when (as here) the contracts do not actually specify those full dollar amounts. Aples' S.J. Opp. at 21-22. Actually, that is not so. The Supreme Court was clear in *Cherokee III* that, contract terms aside, it is the ISDA that directly requires full payment of contract support costs:

The Act specifies that the Government must pay a tribe's costs, including administrative expenses. See §§ 450j-1(a)(1) and (2).

543 U.S. at 635 (emphasis added). As noted *supra* at 12, the Court explained that Congress purposefully placed this duty to pay right into the Act:

The Act also reflects a congressional concern with [the] Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future. See, e.g., § 450j-1(g); see also §§ 450j-1(a), (d)(2).

543 U.S. at 639. It is for this reason that the Tribes there prevailed, even when some of the Tribes' contracts did not specify the full CSC requirement.

On this last point it is incontrovertible that, just like ASNA here, even when the Cherokee Nation was fully paid the lesser amounts specified in its contracts, rather than its full CSC requirement, the Supreme Court still ruled that the Cherokee Nation was entitled to the full requirement it was promised in the Act (and as recorded in IHS's CSC reports). For instance, the

cannot be resolved by resort to these commands, then summary judgment in IHS's favor must be denied under Rule 56(f). Then, discovery may be taken (by deposition and otherwise) to uncover such evidence as may exist that will shed light upon the parties' intentions. See Exh. 21, Aff. of L. Miller; see also 11 WILLISTON ON CONTRACTS § 33:1 (4th ed. 2006) (explaining use of parol evidence when agreements are "ambiguous" or "not a complete integration of the parties' agreement"). After all, it is "the intention of the parties to a contract [that] control its interpretation." *Beta Systems*, 838 F.2d at 1185 (citation omitted). In all events, ASNA's understanding of the contracts is clear. ASNA Exh. 20, Aff. of E. Hopson at ¶¶ 5 & 7.

Cherokee Nation's FY 1997 funding agreement specified "\$1,441,254" in indirect CSCs (*see* Exh. 17, at 5, Joint App. at 188, *Cherokee III* (FY1997 AFA, "Section Six")), and in fact "IHS paid \$1,656,151." *Cherokee Nation v. United States*, 190 F. Supp. 2d 1248, 1254 (E.D. Okla. 2001).⁹ But the Supreme Court held IHS liable anyway for the higher CSC requirement. On remand, IHS ultimately paid an additional \$2,300,000 in damages (plus interest), *see* Consent Judgment, *Cherokee Nation v. United States*, No. 99-092-S CIV (E.D. Okla. July 24, 2006) (Dkt. No. 190), a much higher amount than what had been specified in the annual funding agreement. In short, the issues presented in *Cherokee III* were identical to the issues presented here. The understatement of CSCs on the face of some contracts did not bar recovery in *Cherokee III* and it likewise does not bar recovery now.

The reason for this conclusion is simple: the promise to pay full CSCs is grounded in the Act, apart from any contract term, although every contract (just like ASNA's) incorporates those statutory terms as contract terms. Were it otherwise, IHS could (as it tried to do here), undo all of Congress's reforms in this area by the simple expedient of asserting insufficient appropriations and then adding to the contracts nothing at all for CSCs. The whole point of the 1988 and 1994 ISDA Amendments was to end such chicanery.

Also contrary to IHS's assertion otherwise (Aple's S.J. Opp. at 35, n.24), the Supreme Court necessarily "str[uck] down" the agency's CSC Circulars regarding IHS's waiting lists (or "Queues"), together with IHS's reliance on committee recommendations for assessing when appropriations are "available," for those were the very practices which led to the underpayments the

⁹ Compare *id.* at 1254 ("In fiscal year 1997, the Cherokee Nation calculated that it was entitled to be paid \$4,442,099 in indirect costs associated with carrying out all of its contracted IHS programs.")

Count found to be illegal in the first place.¹⁰ Word-smithing aside, this Board is in the best position to recognize that nothing is being asserted here that was not asserted in the *Cherokee* and follow-on *Seldovia* litigation. The Supreme Court undeniably rejected IHS's defense, including all of the practices by which IHS generally required that contract amounts be set below the full CSC requirement mandated in the ISDA (and that IHS recorded in its "Queue" and other shortfall reports). It is inconsistent, if not disingenuous, for IHS now to deny that *Cherokee III* involved the same situation at issue in this appeal (and under most ISDA contracts), given that when it served IHS's purpose, it pled to the Supreme Court in *Cherokee III* that a defeat for the Government there would mean "[IHS] could face liability up to \$100 million," Exh. 18, at 2, U.S. Pet. for Cert. at 27, *Cherokee Nation v. Leavitt*, No. 03-853 (U.S. Dec. 11, 2003), and after acknowledging to the Court that "in 1996 and 1997, the overall shortfall in CSC funding, including both new or expanded contracts and ongoing contracts, was approximately \$43 million and \$82 million, respectively." Exh. 19, at 2, U.S. Br. at 12, *Cherokee III*.¹¹ As IHS would have it now – now that its gambit in the Supreme Court failed – *Cherokee III* was *sui generis* and involved circumstances never reported anywhere else. As this Board is in the best position to know, that is simply not so.

Significantly, contract language did not matter in the two other cases correctly decided prior to *Cherokee III*, both of which have since been revisited. In *Seldovia* the IBCA noted that IHS, relying on the Circulars, refused to add additional CSC funds to the Tribe's contract – the same

¹⁰ With respect, the District of New Mexico's contrary observation in *dictum* in *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M. Oct. 11, 2006), is in error.

¹¹ See also *Cherokee III*, 543 U.S. at 645-646 (referring to an IHS document acknowledging "unpaid" "contract support cost" debts. [Joint App.] at 206-207" owed to many Tribes); Exh. 17, at 6-9, Joint App. at 206-209, *Cherokee III* ("Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls") (referring on p. 208 to use of unobligated funds to pay "shortfalls in existing contracts" and "the startup and CSC needs of [Tribes] in the ISD Queue"). Plainly the Court was made aware of agency-wide CSC "debts" going back several years.

situation here. The Board found “no significant differences from Cherokee and that the precedent in Thompson [*v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003)] is controlling.” *Appeals of Seldovia Village Tribe*, Nos. 3862-3863, 03-2 B.C.A. (CCH) ¶ 32,400, at *160,337, *160,343, 2003 WL 22422891 (Oct. 20, 2003). It then held IHS liable because of the Act’s mandatory funding provisions. *Id.* In trying to avoid a subsequent fee award, IHS asserted substantial justification based on the allegation that Seldovia’s “contract language differed from that in Cherokee.” *In re Seldovia Village Tribe*, No. 3862, 05-2 B.C.A. ¶ 33,034, at *163,727, *163,729, 2005 WL 1805664 (July 26, 2005). The Board disagreed, noting that “Applicant’s [Seldovia’s] underlying appeal involved essentially the same facts as Cherokee” and “the Government has admitted on numerous occasions that the issues in Seldovia were virtually identical with those in Cherokee ...”. *Id.* Regrettably, IHS is less candid with its admissions here.

Similarly in *Shoshone-Bannock Tribes v. Leavitt*, 408 F. Supp. 2d 1073, 1075-1076 (D. Or. 2005) (Opinion and Order) (Order vacated by Amended Final Order and Judgment issued Jan. 18, 2007, as part of \$1.2 million settlement), the district court applied *Cherokee III* to hold IHS liable, even though IHS’s failure instead arose out of a ““partial declination”” to award any of the required CSC funding, a situation where there was no unpaid amount stated in some “contract.” Plainly having an unpaid amount stated on the face of a contract is not a prerequisite to recovery. Tellingly, the *Shoshone* court observed that “Hundreds of other Tribal contractors were experiencing problems similar to those the Shoshone-Bannock Tribes were experiencing with CSC shortfalls” (*id.* at 1078), an observation that fits ASNA to a tee.

In sum, IHS’s arguments here, like its tolling arguments in its motion to dismiss, are designed only to trap Tribal contractors by denying them the rights Congress plainly intended them

to enjoy under the Act. Here, IHS misled ASNA when it said there were no appropriations legally available to pay ASNA its full CSC requirement. IHS forced ASNA to accept a small fraction of its CSC requirement, even though it knew ASNA had a legal entitlement to more. This Board should not countenance IHS's deceptive conduct by permitting IHS to gain an advantage from these improper means for denying ASNA the full CSCs that Congress intended the agency to pay.

B. IHS's Obligation to Pay ASNA's Full Contract Support Cost Requirement, as Determined by IHS, was not "Discharged by Reconciliation."

IHS devotes three pages to arguing through various theories that IHS's debt to ASNA was "discharged by reconciliation." Aples' S.J. Opp. at 24-26. The argument is wrong.

1. The Facts.

Again, we first review the facts, as revealed both in the record and in the affidavits accompanying this Memorandum. By the year 2000 ASNA had completed its audits of fiscal years 1996 and 1997 and came to believe that IHS had not paid even all of the diminished amounts it had committed to pay under the various annual funding agreements and their amendments. AR 25, at p. 16; ASNA Exh. 20, Aff. of E. Hopson at ¶ 10. According to ASNA's auditor, cash receipts from IHS did not match the numbers in the contracts. The issue was complex, not only because of the high volume of adjustments IHS made each year to those agreements, but because the agreements also contained so-called "buy-back" arrangements under which ASNA bought back from IHS certain services for which ASNA was to pay. *Id.* at ¶ 9. Further complicating these buy-back arrangements, IHS generally withheld from ASNA's contracts a stated sum as an estimate of the cost of the service to be bought back; then, in the course of the year and continuing thereafter, IHS would adjust the

payments back and forth to assure proper crediting for services actually performed. *Id.*¹² (As one example, at the beginning of the FY 1997 contract, IHS held back in this manner \$2,160,694, subject to the parties' final reconciliation following the close of the fiscal year. AR 4, at 2.) As time went on, the financial buy-back and withholding arrangements were well detailed in the AFAs, *see, e.g.*, AR 6, at pp. 9-14 (FY1998 AFA, sec. 5(c)), and those provisions called for a monthly, quarterly and annual "**Reconciliation.**" *Id.* at 13, sec. 5(c)(3)(C). In short, the parties were reconciling the Secretarial amount of funding. Contract support cost funds were never subject to such arrangements, and so there was never any doubt about the amounts of CSCs either specified in the AFA amendments or actually paid pursuant to those amendments. ASNA Exh. 20, Aff. of E. Hopson at ¶ 8-11 (explaining the issue of payments arose over various "personnel" costs).

Following the completion of its audits, ASNA came to believe that it had not been properly paid all of the personnel funds specified in the contracts as supplemented by the various AFAs and AFA amendments. Frustrated by IHS's failure to respond informally, in September 2000 ASNA presented a combined FY1996 and FY1997 claim of \$1,057,149, based upon the claimed discrepancy between the "final contract amount" and the "cash receipts." AR 25, at p. 16 (chart headings). After receiving "reconciliation worksheets for the years in question," ASNA in January 2001 rescinded its claim (AR 25, at p. 24 (omitting worksheets)) and gave its "[c]oncurrence" to an "ANNUAL FUNDING AGREEMENT & BUY-BACK ACCOUNT RECONCILIATION" requiring

¹² Attachment 2 to the 1996 Contract is the original ASNA contracting proposal (AR 3, at 49-104) and it is incorporated by reference into ASNA's Contract. *Id.* at 15 (sec. (b)15.F(2)(B)). Although portions of this document were omitted from the Administrative Record (including portions dealing with the parties' agreement concerning CSCs), by letter dated December 5, 2006, counsel for IHS lodged portions of this document with the Board. The document details some of the buy-back arrangements under which contract funds would be used to purchase certain IHS managed central warehouse supplies, pay for certain federal personnel, and cover travel and subsistence for certain federal specialists and consultants. *See* IHS Dec. 5, 2006 submission to the Board at 31-32.

IHS to pay ASNA \$523,578. *See* AR 25, at p. 15 (stating at the outset that “there has been no reconciliation of the FY1996 and FY1997 [AFAs] to date”). On the same date ASNA gave a similar “[c]oncurrence to a reconciliation covering the contracts for fiscal years 1998, 1999 and 2000. *Id.* at 14 (noting resulting IHS debt to ASNA of \$209,089). Significantly, IHS neither requested nor was given a “Release” covering any of these contracts (although in its Internal Agency Procedures Manual IHS has available a routine form of “Release” for ISDA contracts).

It is based upon these cash “reconciliation” documents that IHS, in the alternative, now claims it owes no further amounts to ASNA.

2. The Doctrine of “Account Stated” Does Not Bar ASNA’s CSC Claims.

The doctrine of “account stated” or “account settled” is a rule of proof, establishing the “prima facie ... correctness of the items” being accounted for, “unless this presumption is overcome by proof of fraud, mistake, or error.” *City of St Petersburg v. Meyers*, 55 F.2d 810, 812-13 (5th Cir. 1932). As reflected in the case IHS cites, the rule applies when the evidence shows that there was a “meeting of the minds” and that both parties agreed “that a full and complete settlement of all their accounts was being made.” *Nelson v. Chicago Mill and Lumber Corp.*, 76 F.2d 17, 22 (8th Cir. 1935) (rejecting the Rule’s application and leaving to the jury to decide how to interpret the parties’ conduct). The core of the doctrine of account stated is that the agreement which the parties reached by their computations was, in fact, intended to cover the specified accounts that are at issue once again. *Nelson*, 76 F.2d at 21 (“An account stated is an agreement between parties covering previous transactions that all the items of the account and the balance struck are correct, coupled with a promise, express or implied, for the payment of such balance.”)

Here, it is plain that the basic requirements for an account stated have not been met. To

begin, there was never any effort by the parties to address their disagreements over contract support cost issues, a matter both parties knew was in litigation in other fora. ASNA Exh. 20, Aff. of E. Hopson at ¶ 13. Thus, while the two reconciliations completed in late 2000 may be effective for purposes of other aspects of the parties' financial transactions – namely the Secretarial funding and the “personnel costs” contained in that funding – (a matter we do not address here), they cannot be effective for addressing the parties' disagreement over contract support cost issues. Put differently, the parties may well have intended to square the “contract amounts” against the “cash receipts,” but the documents and Mr. Hopson's affidavit reveal that that is all they intended to address. To the extent CSCs were on IHS's mind, there was no “meeting of the minds” in so far as ASNA is concerned.

Further, when it comes to contract support costs, there were never any back and forth transactions such that the doctrine would even apply. The doctrine of “account stated” is intended to apply to a situation where the two parties have mutual accounts, constituting debts and credits to one another. But when it comes to contract support costs, no such situation is presented, for no monies flow back and forth between ASNA and IHS.

Moreover, an “account stated” is merely a rebuttable rule of proof, and is thus subject to attack based upon fraud, mistake or other equitable considerations that would make enforcement of the Rule inappropriate in a given context. *George S. Colton Elastic Web Co. v. White*, 23 F. Supp. 761, 762 (D. Mass. 1938) (collecting cases). *In re Rockefeller Center Props.*, 266 B.R. 52, 59 (S.D.N.Y. 2001) (recognizing account stated can be set aside for mistake or other equitable considerations). Here, it would certainly be inappropriate to take an auditor's count of the dollars owing on the face of a contract, prompting an examination into those dollars and a reconciliation

as to their amounts, and to import that process here so as to preclude a trial on an entirely different issue: whether IHS acted improperly in placing into the contract less than ASNA's full CSC requirement. Nothing in the parties' conduct indicates that they even considered such a claim, although they both knew of such claims generally, and even though both knew such claims were being litigated on a potential class basis that, if successful, would include ASNA. It is settled that if the account stated was "not intended to include the particular claim as to which a question has now arisen," it cannot be invoked to bar the claim. 29 WILLISTON ON CONTRACTS § 73.61 (4th ed. 2006). *See also Perkins v. Hart*, 24 U.S. 237, 256-57 (1826) (distinguishing between the parties' account stated for monies "lent and advanced for the use of the testator" and "any other demand not included in the settled account.") The inequity and potential fraud is palpable when one considers that (1) at the very time of the "Reconciliation," all tribunals to have ruled on CSC issues had found IHS liable (the IBCA in *Cherokee Nation* and the District of Oregon in *Shoshone-Bannock*), (2) IHS made no mention of the CSC issue in the reconciliation process, (3) a putative class action in which ASNA was an absent class member was pending at the time the "Reconciliation" occurred,¹³ and (4) IHS now appears years later to argue that the Reconciliation in fact released and waived all of ASNA's CSC claims. On the other side of the ledger, IHS offers nothing even to suggest that it relied to its detriment on a belief that the 2000 "Reconciliation" resolved the very different CSC issue presented here. *Compare Leather Mfrs.' Bank. v. Morgan*, 117 U.S. 96, 107-108 (1886) (discussing estoppel principle in the context of an "account stated").

Here, *George S. Colton* is instructive. In that case a taxpayer stipulated as to the amount of

¹³ *See In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 249 (S.D.N.Y. 2005) (rendering invalid arbitration agreements signed by absent class members during pendency of class proceedings, reasoning credit card company's "communication with putative class members was improper because they sought to alter the status of this litigation and available remedies") (citation omitted).

a tax deficiency at the same time that his tax liability was before the Board of Tax Appeals under circumstances where the taxpayer was unaware he was entitled to a further deduction. Finding that had the taxpayer known of the deduction “it would not have stipulated to the deficiency,” the court rejected the government’s effort to set up the stipulation as a defense. *See also Reich v. Youghiogheny and Ohio Coal Co.*, 858 F. Supp. 1381, 1389 (S.D. Ohio 1994) (“[a]n account stated is not conclusive when it is shown to be mistaken”). Similarly here, it is plain that ASNA would never have agreed to the reconciliation if it understood the account also included such items as fiscal year 1997’s claim for over \$1.65 million. The doctrine is not a trap for the unwary to be used by sharp dealers, but a sensible rule providing that an accounting, once done correctly and agreeably, ought not to have to be redone.

Ultimately, the issue is one of proof, not of law, and thus summary judgment in favor of IHS is inappropriate, particularly absent an opportunity to inquire through discovery into the circumstances giving rise to the allegedly ‘settled’ accounts.

In sum, only by a formal and express release of ASNA’s claims, knowingly entered into, would an issue arise. Here no such release exists, although in other CSC litigation IHS has raised the issue of express “releases” in defense of other CSC claims. Defendants’ Opp. to Plaintiff’s Mtn. for Class Certification, at 37-38, Dkt. No. 306, *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M. Sept. 1, 2006). Under these circumstances, IHS’s defense of account stated as a basis for summary judgment should be denied.

II. CONCLUSION

For the foregoing reasons, ASNA respectfully requests that the Board deny IHS’s Cross Motion for Summary Judgment. IHS had a contractual obligation to pay ASNA’s full CSC

requirements, and that obligation was not discharged, released or otherwise settled by the parties’
2000 “reconciliation” of contract amounts against receipts.

Respectfully submitted this ___th day of February 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by first class mail to the following parties of record this __ day of _____ 2007:

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LIST OF EXHIBITS

1. *Appeals of Cherokee Nation*, Nos. 3877-3879, 99-2 B.C.A. (CCH) ¶ 30,462, 1999 WL 440045 (June 30, 1999)
2. March 27, 2000 Memorandum to Area Directors, IHS Headquarters Division of Financial Management Director Carl Fitzpatrick
3. Department of the Interior and Related Agencies Appropriations Hearings Before A Subcomm. of the House Comm. On Appropriations, 105th Cong., 2nd Sess. (1998)
4. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES: INDIAN SELF-DETERMINATION ACT, SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (June 1999) (“1999 GAO Report”)
5. *Ramah*, No. 90-957, Partial Settlement Agreement (D.N.M. Aug. 31, 1998)
6. ISD Queue (Sept. 17, 1997)
7. *Zuni* Compl., No. CV 01-1046 (filed Sept. 10, 2001) (Dkt. No. 1)
8. *Zuni* First Am. Compl., No. CV 01-1046 (filed Dec. 12, 2001) (Dkt. No. 5)
9. *Zuni* Order Granting Stay, No. CV 01-1046 (Dec. 28, 2001) (Dkt. No. 8)
10. *Zuni* Order Lifting Stay, No. CV 01-1046 (Mar. 17, 2005) (Dkt. No. 32)
11. *Zuni* Pl. Mem. in Support of Class Certification, No. CV 01-1046 (excerpts) (filed June 6, 2006) (Dkt. No. 281)
12. Excerpts of Statutes
13. *Ramah*, No. 90-957, Mem. Op. and Order (D.N.M. Aug. 31, 2006) (Dkt. No. 1042)
14. *Ramah*, No. 90-957, Order & Mem. Op. (D.N.M. Oct. 1, 1993) (Dkt. Nos. 95 & 96)
15. ISD Queue Lists 1996 - 1998.

Exhibits to ASNA’s Memorandum in Opposition to Appellees’ Motion for Summary Judgment:

16. FY 2000 CSC Shortfall Report (Alaska Area)

17. Cherokee Nation's FY 1997 Annual Funding Agreement
18. Excerpt, U.S. Pet. for Cert., *Cherokee Nation v. Leavitt*, No. 03-853 (U.S. Dec. 11, 2003)
19. Excerpt, Joint App., *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee III*)
20. Aff. of Eben Hopson
21. Aff. of Lloyd B. Miller
22. Aff. of Lee Olson

Exhibits to ASNA's Reply Memorandum in Support of Appellant's Motion for Partial Summary Judgment:

23. ISD Queue #99-1 (Oct. 23, 1998)