

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MENOMINEE INDIAN TRIBE)
OF WISCONSIN,)
)
 PLAINTIFF,)
)
 v.)
)
UNITED STATES OF AMERICA,)
MICHAEL O. LEAVITT, Secretary of the)
Department of Health & Human Services, and)
CHARLES W. GRIM, Director of the)
Indian Health Service,)
)
 DEFENDANTS.)
)

Case No.: 1:07cv00812
Hon. Rosemary M. Collyer

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION AND SUMMARY

The Menominee Indian Tribe of Wisconsin ("Tribe") presents a simple claim: Defendants breached the Tribe's contracts by failing to pay the full contract support costs ("CSC") promised by section 106 of the Indian Self-Determination and Education Assistance Act ("ISDEAA") and the contract provisions incorporating it. Section 106 "require[s] that the Secretary provide funds for the full administrative costs to the tribes."¹ In other words, the Government must pay 100% of the Tribe's CSC requirement, as calculated by procedures established by statute and regulation. Defendants argue, in their Motion to Dismiss ("Def. MTD"), that they paid 100% of what they paid, and therefore could not be liable for breach. This argument begs the question of how much the Government should have paid to comply with the contractual and statutory mandate of full payment. Critically, Defendants do not (and cannot) show that the amount paid equaled the amount owed, so their motion to dismiss on grounds of full performance must fail.

Defendants also assert that the Tribe, by accepting the inadequate amount of CSC the Government paid, thereby waived its right to the full amount and is now estopped from claiming the difference. The chronology of payments under the Tribe's contracts, which Defendants completely ignore, makes clear that the Tribe did not "waive" its claim to full payment, because neither that amount nor the lesser amount Defendants actually paid could have been known until the end of the contract year. Moreover, the Tribe, as a member of the class uniquely benefited by the ISDEAA, cannot waive its statutory rights by contract.

Defendants also move to dismiss the Tribe's 1996, 1997 and 1998 claims based on the Tribe's alleged failure to comply with the statute of limitations in the Contract Disputes Act

¹ *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1081 (Fed. Cir. 2003) ("*Thompson*"), *aff'd Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) ("*Cherokee Nation*"); *Cherokee Nation*, 543 U.S. at 634 (citing section 106, 25 U.S.C. § 450j-1, for proposition that "[t]he [ISDEAA] specifies that the Government must pay a tribe's costs, including administrative expenses").

("CDA"). This argument ignores the well-established rule that the filing of a class action—such as the CSC class actions filed by the Cherokee Nation in 1999 and the Pueblo of Zuni in 2001—tolls the statute of limitations as to all members of the putative class, such as the Tribe.²

Finally, Defendants acknowledge that the Tribe's 1995 claims are not subject to the CDA statute of limitations, but contend those claims should be barred by laches. In fact, the Tribe's delay in bringing the claims was not unreasonable in light of the CSC class actions pending throughout most of the period, and involving claims identical to the Tribe's. In any event, the Defendants were not prejudiced by the delay.

BACKGROUND

The ISDEAA and the Importance of Full CSC

The ISDEAA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). The mechanism for doing so relevant to this action is the self-determination contract under Title I of the ISDEAA. For many years the Tribe, under its Title I contracts and annual funding agreements ("AFAs"), has carried out programs, functions, services and activities ("PFSAs") for the benefit of its members and other beneficiaries that the Secretary would otherwise have administered directly. Throughout the period at issue, the Tribe operated a comprehensive health services program, including medical, dental, and community health services for eligible individuals within the service area.³

²*American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

³ See, e.g., Def. Ex. A at 003 § C.3 (describing program in 1995 contract).

To enable the Tribe to provide these services, the ISDEAA requires that the contract include an amount "not less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract...." 25 U.S.C. § 450j-1(a)(1). This amount, often referred to as the "Secretarial" or "program" amount, does not reflect the full cost of carrying out programs in the contract. The Tribe must also carry out administrative activities that the Secretary does not need to carry out because they are done by other federal agencies, for example the Office of Personnel Management, the General Services Administration, the General Accountability Office, and the Department's Office of General Counsel. In addition, Tribes incur costs to carry out ISDEAA contracts that the Secretary does not incur when he carries out the activities directly, such as obtaining insurance, and completing annual audits under the Single Agency Audit Act, 31 U.S.C. § 7501 *et seq.*

To cover these additional costs, Tribes historically were compelled to either divert federal program funds, thus reducing services, or expend tribal funds, in effect subsidizing the federal program. Congress recognized this dilemma twenty years ago:

[T]he single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts.

S. Rep. No. 100-274, at 8 (1987).

Responding to "the overwhelming administrative problems caused by indirect cost shortfalls," *id.* at 12, Congress amended the ISDEAA by adding a new section 106.⁴ Section 106(a)(2) and (3) provide as follows:

(2) There shall be added to the amount required by paragraph (1) 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

⁴ Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, § 205 (Oct. 5, 1988), codified at 25 U.S.C. § 450j-1.

compliance with the terms of the contract and prudent management, but which --
(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3) (A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of-

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106(a)(1).

25 U.S.C. § 450j-1(a)(2), (3).

Congress emphasized in section 106(g) that tribal contractors are to receive not just some CSC, but their full need: "Upon 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 section 106(a)..." *Id.* § 450j-1(g) (emphasis added).⁵

Thus, the statute could not be more clear: Tribes are entitled to be paid 100% of the CSC that they need. But how is that dollar amount to be determined?

Determining Indirect Cost Requirements

As noted in the Complaint, of the three types of CSC only indirect costs are at issue here. For the Tribe, as for the vast majority of tribal contractors, the indirect cost requirement was (and is) calculated under established federal procedures by multiplying a negotiated indirect cost rate

⁵ The Senate Report emphasizes several times that these provisions are not half-way measures meant to reduce diversion of program and tribal funds, but to eliminate such diversion by mandating full funding. *E.g.*, S. Rep. No. 100-274, at 12 ("The most relevant issue is the need to fully fund indirect costs associated with self-determination contracts."); *id.* at 13 ("Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.").

by the direct cost base.⁶ This is the Government's standard method, the method contemplated by Congress when it enacted section 106, and the principal method ultimately adopted by the Indian Health Service's ("IHS") own policies.⁷

Accordingly, in 1996 when the Secretary published the Department's regulations implementing Title I of the ISDEAA, the rules specify that reasonableness, allowability, and allocability of self-determination contract costs for tribal governments are to be determined based on OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments." 25 C.F.R. § 900.45(e). Circular A-87, in turn, requires tribes to recover indirect costs through the rate method, with very limited exceptions.⁸

Even before the regulations were published in 1996, the IHS for many years had calculated indirect cost requirements by multiplying a tribe's direct cost base by its negotiated

⁶ The direct cost base, for the purpose of calculating indirect costs, is comprised of the "Secretarial" or program amount under section 106(a)(1), less capital expenditures and pass-through funds, plus direct contract support costs. *See* Exhibit A at 4 (IHS CSC policy circular, ISDM 92-2, provision that direct contract support funds will be considered part of the recurring base); Exhibit B at 12 (IHS Circular No. 96-04 provision that direct contract support funds and section 106(a)(1) funds comprise recurring base); Exhibit C at 1 (providing, in indirect cost rate agreement, that applicable base excludes equipment and pass-through funds).

⁷ *See, e.g., Cherokee Nation v. Leavitt*, 543 U.S. 631, 635 (2005) (quoting Government's brief as saying that indirect costs are "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe"); 25 U.S.C. § 450j-1(c)(3)–(5) (requiring IHS, in its CSC shortfall report to Congress, to include information on indirect cost rates, direct cost bases, and the resulting indirect cost pool amounts); *id.* § 450b(g) (defining "indirect cost rate" as "the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency"); S. Rep. No. 100-274, at 17-18 (explaining Congress's expectation that indirect costs be calculated in accordance with Office of Management and Budget ("OMB") Circular A-87, which uses rate-times-base method); Exhibit A at 6 (IHS CSC policy circular ISDM 92-2 provision that indirect costs for recipients with indirect cost rates "will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose"); Exhibit B at 7 (IHS Circular 96-04 provision stating same rule).

⁸ *See generally* OMB Circular A-87, Attachment E ("State and Local Indirect Cost Rate Proposals"); *id.* § D.1.c ("Each Indian tribal government desiring reimbursement of indirect costs must submit its indirect cost [rate] proposal to the Department of the Interior (its cognizant Federal agency).") The Circular allows indirect cost allocations not using rates in certain limited situations. Attachment E, § F.3 (allowing narrative cost allocation methodology where rate method inappropriate).

indirect cost rate to come up with a dollar amount owed for indirect costs.⁹ The IHS followed that policy for the next fifteen years, and still does.¹⁰ What Congress did, and the 1996 regulations implemented, was to require that the full amount, so established, be paid. For recipients without indirect cost rates, the rate-times-base method cannot be used, and a lump-sum for "indirect-type costs" is negotiated. *See* Exhibit A at 6; Exhibit B at 7. The Tribe, however, did have a negotiated indirect cost rate in each of the years at issue in this case, so these lump-sum payment provisions are not relevant to the issues in this case.¹¹

In summary, the IHS, like other federal agencies, and for all of the years at issue in this case, calculated indirect cost needs by applying a negotiated rate to the program base, consistent with the ISDEAA, its regulations, OMB Circular A-87, and the IHS's own CSC policy circulars.

The Incremental Process of Payment Under an ISDEAA Contract

Each year the Tribe develops a budget and proposes an initial contract amount based on historical and projected figures, with the understanding that additional funds will be added to the contract by amendment during the year if, for example, the Tribe assumes new or expanded PFSAs, its indirect cost rate changes, or the amount of formula funding for a particular PFSA is

⁹ *See, e.g.*, Exhibit A at 6 (IHS CSC policy circular ISDM 92-2 provision that indirect costs for recipients with indirect cost rates "will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose").

¹⁰ *See, e.g.*, Exhibit B at 7 (IHS Circular 96-04 provision stating same rule); IHS Circular No. 2000-01 § 5(A)(2)(c)(i) (same); IHS Circular No. 2001-05 § 5(A)(2)(c)(i) (same); IHS Circular No. 2004-03 § 5(A)(2)(c)(i) (same).

¹¹ *See* Exhibit C (containing rate agreements for each of the years at issue in this appeal). As specified in the first paragraph of each agreement, "[t]he indirect cost rates contained herein are for use on grants and contracts with the Federal Government to which Public Law 93-638 [the ISDEAA] and Office of Management and Budget Circular A-87 apply...." *E.g.*, Exhibit C at 1; *id.* at 5. The Tribe's 1995 contract also specifies the rate-times-base method. Def. Ex. A at 004, § G.1.e (providing that "indirect costs shall be reimbursed at the provisional fixed rate of 12.73% percent [sic] of the direct costs chargeable to this contract...."). The rate was later re-negotiated to 13.80%, as reflected in the rate agreement and the Complaint. Exhibit A at 1; Complaint ¶¶ 25. The rate was also changed from a "provisional" to a "fixed with carryforward" rate.

determined.¹² The Tribe's contracts and AFAs were amended several times over the course of each contract year to add funding and associated responsibilities.¹³

Because the Tribe's direct cost base could expand significantly during the course of a contract year, and the Tribe's negotiated indirect cost rate could change as well, it was impossible for the Tribe (or the IHS) to know the Tribe's full indirect cost need for the year at the time of signing the initial contract and/or AFA in each year. Nor could the Tribe know how much indirect cost funding the IHS would provide by the end of each year, because modifications could include indirect as well as direct program funding.¹⁴ Indeed, supplemental indirect cost funding for a given contract year could arrive well after that year had ended, by way of a modification to the following year's AFA.¹⁵

Unfortunately, in none of the years at issue in this case did the relatively small installments of additional indirect cost funding provided by contract amendment bring the Tribe up to 100% of its full requirement in any year, as documented by the Tribe's records and in the IHS's own "shortfall reports."

¹² See, e.g., Def. Ex. B at 025, § 6(1)(f) and (g) (FY 1996 AFA provisions stating that initial AFA does not include funding for Headquarters or Area Office tribal shares, but that such funds will be included later by amendment); *id.* at 014, § (e)(2)(B) (FY 1996 contract provision stating that modifications adding supplemental funds for PFSAs already included in initial AFA are not subject to written approval requirement). The latter provision on contract modifications to supplement funding is part of the statutory Model Agreement in section 108 of the ISDEAA, and thus is contained in all of the Tribe's contracts from 1996-2004 as required by statute. See 25 U.S.C. § 450l(c), § 1(e)(2)(B).

¹³ See, e.g., Def. Ex. A at 015-016 (Modification No. 9 to 1995 contract); Def. Ex. B at 028-029 (Modification No. 5 to 1996 AFA).

¹⁴ See, e.g., Def. Ex. A at 12-13 (modification to 1995 contract, dated September 13, 1995, adding \$31,400 for indirect costs ("CSC IDC") in order "to supplement IDC FY '95 shortfall"); Def. Ex. B at 28 (modification to 1996 AFA, dated September 24, 1996, adding \$30,000 for indirect costs).

¹⁵ See Def. Ex. D at 016 (adding, in modification to FY 1998 AFA dated September 23, 1998, "\$618 of FY '97 CSC IDC shortfall," along with "\$498 of FY 98 CSC IDC shortfall"). Funds appropriated in each of the years in question could be obligated through the end of the succeeding fiscal year. See, e.g., Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (1996), 110 Stat. 1321, 1321-189 (providing that FY 1996 appropriations for IHS "shall remain available for obligation until September 30, 1997").

The IHS Shortfall Reports

While section 106, as enacted in the 1988 amendments, required full payment of CSC from available appropriations, the IHS continued to underpay tribal contractors considerably. It did so based on the agency's interpretation of section 106(b), which makes funding "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, the IHS maintained that the Secretary had the discretion to limit "available" funds to the amounts recommended in committee reports on the appropriations bills.¹⁶ From FY 1998 onward, the IHS believed that available funds were limited by the purported CSC spending "caps" Congress inserted in the appropriations acts. *See* Complaint ¶¶ 35 and n.2. Therefore, in every one of the claim years, the IHS severely underpaid the CSC of tribal contractors, including the Tribe, a fact documented in the agency's annual "shortfall reports."

Section 106(c) requires that the Secretary provide Congress an annual report that includes "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." 25 U.S.C. § 450j-1(c)(2). These "shortfall reports" were to include detailed information for each tribal contractor on direct cost bases, indirect cost rates, and indirect cost shortfalls, if any. *See id.* § 450j-1(c). Like other IHS Area Offices, the Bemidji Area Office, in whose region the Tribe is located, created shortfall reports documenting CSC underpayments to tribal contractors in its region. *See, e.g.,* Exhibit D at 3 (FY 2000 Bemidji Area shortfall report). To calculate the shortfalls, consistent with the ISDEAA and the CSC circulars, the IHS multiplies the direct cost base, *id.* column K, by the most current approved indirect cost rate, *id.* column L, to determine indirect cost need, *id.* column N. Applying this method to the Menominee Tribe, in FY 2000 the IHS applied the

¹⁶*See Thompson v. Cherokee Nation*, 334 F.3d 1075, 1087-88 (Fed. Cir. 2003) (summarizing and rejecting Secretary's interpretation, and holding that funds available for payment of CSC included agency's entire unrestricted lump-sum appropriation); *Cherokee Nation*, 543 U.S. at 644 (same).

Tribe's indirect cost rate of 10.88% to a direct cost base (after exclusions) of \$4,441,470 to arrive at an indirect cost requirement of \$483,232. *Id.* column N; *cf.* Exhibit C at 21 (indirect cost rate agreement establishing rate of 10.88% for contract year 2000). But the IHS paid only \$338,147, Exhibit D at 3, column O, plus \$63,829 in tribal shares counted as CSC, *id.* column D, leaving a shortfall of \$81,256, *id.*, column S.¹⁷

The Tribe has not been able to obtain Bemidji Area shortfall reports for every year at issue in this action, and does not know whether the Area Office in fact compiled reports for each year. The reports represent the agency's best effort to inform Congress of the extent of the shortfalls, as calculated by the rate-times-base method.¹⁸

STANDARD OF REVIEW

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP"), the court assumes the truth of the allegations made and views all reasonable inferences in plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Empagren S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003). The court may receive and consider extrinsic evidence. *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). The court must permit the pleader to respond with supporting evidence and, where necessary, convene an evidentiary hearing when jurisdiction depends on findings of fact. *See McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 290 (3d Cir. 2006); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 546 (10th Cir. 2001).

¹⁷ *Cf.* Complaint ¶ 25 (calculating 2000 shortfall as \$152,030).

¹⁸ The shortfall reports apply rates that are not adjusted to account for federal programs that pay little or no indirect costs, so the rates are diluted and result in exacerbated shortfalls, as the Tribe maintains in its "miscalculation claims." Complaint ¶¶ 26-33. The "shortfall claims" assert that the IHS failed to pay even the lesser amount yielded by applying the diluted rates, as documented in the shortfall reports and other records.

In considering Defendants' motion to dismiss under FRCP 12(b)(6), the court must presume that all well-pleaded allegations are true, resolve all doubts and inferences in the Tribe's favor, and view the Complaint in the light most favorable to the Tribe. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 170-71 (2005); *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 125 S. Ct. 1955, 1965 (2007) ("*Twombly*"). The Rules "erect a powerful presumption against dismissing pleadings for failure to state a claim." *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994) (citations and internal quotation marks omitted). Motions to dismiss are disfavored and rarely granted. *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005); *see also* FRCP 8 (requiring only short, plain statement showing entitlement to relief). A claim will not be dismissed if it "nudge[s] ... across the line from conceivable to plausible." *Twombly*, 125 S. Ct. at 1974. (2007). Once a claim is stated adequately, "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969.

RULE OF CONSTRUCTION

The ISDEAA and the Tribe's contracts mandate that "[e]ach provision of the [ISDEAA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and ... related functions, services, activities, and programs ..., including all related administrative functions, from the Federal Government to the Contractor." Def. Ex. B at 005, § (a)(2) (1996 Contract); 25 U.S.C. § 450l(c) (§ 1(a)(2) of the Model Contract). This statutory rule of construction applies to both the ISDEAA provisions at issue in this case and to all the terms of the Tribe's agreements with Defendants.

ARGUMENT

I. Defendants Failed, in Each Year, to Pay the Tribe's Full Indirect Cost Need as Promised in the Contracts.

The Tribe's claims are straightforward: Defendants promised to pay the Tribe's full indirect costs as required by section 106 and the contract provisions incorporating it. Defendants also agreed to indirect cost rates that determined what the full requirement would be in each year. Defendants failed in each year to pay 100% of the Tribe's indirect costs, as determined by applying the negotiated rate to the applicable direct cost base, and Defendants do not argue otherwise. The IHS shortfall reports in the Tribe's possession confirm this to be so.¹⁹

To avoid liability, Defendants urge this court to focus solely on the amount they paid, and ignore the amount they owed—along with the indirect cost rate agreements that the IHS itself used to determine the amount owed. Defendants point to accounting data in the final contract modification for each year showing how much the IHS paid for indirect costs in that year. Defendants then argue that because they paid every penny of the amount recorded as paid, they did not breach the contracts. This argument confuses the contractual promise to pay in full (in accordance with section 106) with the accounting data tracking how much progress has been made toward full payment. Under Defendants' circular argument, the amount owed is the amount indicated in the contract as paid, so whatever the IHS pays would be precisely what it owes. The IHS could pay the Tribe one dollar for indirect costs and still claim "full performance" of this breach-proof contract. This absurd result is not what Congress intended in the ISDEAA and not what the parties' contracts say.

¹⁹ In all of the claim years, the contracts, AFAs and modifications themselves provide ample evidence of indirect cost shortfalls. The presence or absence of an IHS shortfall report for any given year is not necessary either to establish liability or to calculate damages. The IHS shortfall reports are useful, however, to underscore the disingenuousness of Defendants' newly minted litigation position that there never has been one dollar of shortfall. *See* Def. MTD at 10-15 (maintaining that government paid full amount promised in each contract).

A. *Defendants Promised to Pay in Accordance with Section 106 of the ISDEAA.*

Since 1988, the ISDEAA has required the Secretary to "add to the contract the full amount of funds to which the contractor is entitled under section 106(a)." 25 U.S.C. § 450j-1(g). The Tribe's agreements for 1996-2004 explicitly reflect this requirement. Def. Ex. B at 006-007 (providing, in contract governing 1996-1998, that funding amount in AFA "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA]"); Def. Ex. E at 006 (same provision in contract governing 1999-2001); Def. Ex. H at 005 (same provision in contract governing 2002-2004).

The 1995 contract does not contain an identical provision, but payment in accordance with section 106(a) was required by statute, as noted above. In any event, the 1995 contract promises to pay indirect costs at 12.73% of the direct cost base, a figure later amended by the indirect cost agreement to 13.8%, both of which agreements the IHS breached. The Motion to Dismiss does not assert, and the contract modifications do not indicate, that the IHS paid indirect costs at anything close to either percentage of the applicable direct cost base. Def. Ex. A at 004, § G.1.e (promising payment of indirect costs at 12.73% of base); *id.* at 016 (documenting payment of \$363,229 in indirect costs on a direct cost base of over \$4 million).

B. *Section 106 Requires Full Payment of Indirect Costs from Available Appropriations.*

Section 106 "require[s] that the Secretary provide funds for the full administrative costs to the tribes." *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1081 (Fed. Cir. 2003) ("*Thompson*") (emphasis added), *aff'd Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) ("*Cherokee Nation*"); *Cherokee Nation*, 543 U.S. at 634 (citing section 106, 25 U.S.C. § 450j-1, for proposition that "[t]he [ISDEAA] specifies that the Government must pay a tribe's costs, including administrative expenses").

Despite this clear language, Defendants argue that the ISDEAA does not require full payment, or indeed any payment. Def. MTD at 16. In Defendants' view, the ISDEAA requires only that the parties negotiate a contract, and "there is no 'independent' right under the ISD[EA]A to CSC." *Id.* at 17. In support of this proposition, which runs directly counter to the *Thompson* and *Cherokee Nation* decisions quoted above, Defendants cite *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005). In that case, the Nation sought to collect funds for the contracts it could have had under the ISDEAA had the federal government not wrongly removed the Nation from its list of federally recognized tribes. The court declined to award "damages for contract support costs never incurred, on contracts never created." *Id.* at 1367. In contrast, the Tribe in this case had contracts with Defendants in each year at issue, fully performed in accordance with the terms of those contracts, and in doing so incurred large amounts of indirect costs for which the Tribe was not fully paid. Once a tribe does have an ISDEAA contract, as the Tribe did, the statute requires full payment.²⁰

The contractual provision governing "Funding Amount" that incorporates section 106(a)—and the statutory Model Agreement provision it is based on—has two sentences. Defendants' Motion to Dismiss ignores the second of the two:

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA].

Def. Ex. B at 006-007; Def. Ex. E at 006; Def. Ex. H at 005; 25 U.S.C. § 450l(c), § 1(b)(4).

Defendants focus on the first of these two sentences to argue that as long as the Secretary pays

²⁰ Defendants also cite *Pueblo of Zuni v. United States*, 467 F. Supp.2d 1114, 1116-17 (D.N.M. 2006) in support of the idea that the contracts, not the ISDEAA, create an entitlement to CSC. Def. MTD at 17-18. In that case, the court held that the Pueblo could not avoid the mandatory exhaustion requirement of the Contract Disputes Act ("CDA") by framing its contract claims as statutory rights. That holding is irrelevant to this case, because the Tribe has exhausted its administrative remedies under the CDA and seeks damages for the breach of contract terms required by statute.

the amount specified in the AFA—whether it be 100% of need, or one dollar—there is no breach. That reading, however, renders the second sentence a nullity, violating canons of both statutory and contract interpretation. The Supreme Court has often said that "effect must be given, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883)). The same is true of a contract: courts will interpret a contract in a manner that gives reasonable meaning to all of its provisions. *E.g.*, *Beal Mortgage, Inc. v. F.D.I.C.*, 132 F.3d 85, 88 (D.C. Cir. 1998) (stating principle and adding that where possible courts should endeavor as well to render terms consistent with each other).

The two sentences are consistent with each other, and both can be given full effect. The first sentence directs that the amount owed be made available to the Tribe by inclusion in the AFA. The second sentence governs the amount—full funding under section 106(a). In other words, the first sentence describes the mechanism for transferring the funds, while the second sentence explains the amount that must be paid.

Defendants argue that the contract provisions promising full payment in accordance with section 106 conflict with the specific dollar amounts identified in the "Appropriations and Accounting Data" in the amendments, and the specific term should govern over the general term. Def. MTD at 17 n.5. But there is no conflict between the promise of full payment and the documentation of a specific amount paid that represents less than full payment. The contract or AFA simply must be amended (again) to increase the amount "available" to the Tribe—i.e., paid—to equal the amount that represents full payment. If the IHS fails to do so, as was the case in the years at issue, the IHS has breached the contract. *See, e.g., Appeals of Seldovia Village Tribe*, IBCA 3862-3863/97 (October 20, 2003) (attached as Exhibit E) (holding IHS liable for

failure to amend the AFA to reflect higher indirect cost rate negotiated with Department of Interior, despite IHS payment of amount of CSC originally specified in AFA).

C. Defendants Were Bound to, and Did in Fact, Determine the Tribe's Indirect Cost Needs by the Rate-Times-Base Method.

While it is clear from section 106(g) that the "full amount" must be paid, some means for determining that amount must be employed. The calculation of indirect cost requirements for the Tribe, as for the vast majority of Tribes and indeed federal contractors generally, was made by applying a negotiated indirect cost rate to the direct cost base. IHS policy throughout the relevant years was clear: for contractors with established indirect cost rates, such as the Tribe, the IHS was required to award indirect costs "by applying the negotiated rate(s) to the direct cost base amount for this purpose." Exhibit A at 6 (ISDM 92-2); Exhibit B at 7 (IHS Circular No. 96-04). Moreover, the IHS was required by statute to include the base, rate, resulting need, amount paid, and shortfall (if any) in its annual shortfall report to Congress. 25 U.S.C. § 450j-1(c). And the IHS did just that, at least in some of the shortfall reports the Tribe has been able to obtain. See Exhibit D at 3 (2000 report); *id.* at 4 (2001).

Defendants' attempt to disclaim the rate method now, when application of that method has been agency policy and practice for over fifteen years, is disingenuous at best. Defendants assert that the ISDEAA does not require "a specific formula" to determine the indirect costs to be paid to a tribe, but the ISDEAA regulations require that tribal governments determine indirect costs in accordance with OMB Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments." 25 C.F.R. § 900.45(e). The Circular, issued to the heads of all executive departments, "establishes principles and standards for determining costs for Federal awards, describes the indirect cost rate method and how to submit a proposal, and identifies the Department of the Interior ("DOI") as the cognizant federal agency for Indian tribes. OMB

Circular A-87, ¶ 1 and Attachment E.²¹ In accordance with the ISDEAA regulations and OMB Circular A-87, the Tribe submitted indirect cost rate proposals each year to the DOI and received an approved government-wide indirect cost rate for each year. *See* Exhibit C. The rate agreements specifically apply to ISDEAA agreements. As the first paragraph of each agreement recites, "[t]he indirect cost rates contained herein are for use on grants and contracts with the Federal Government [not just DOI] to which Public Law 93-638 [i.e., the ISDEAA] and Office of Management and Budget Circular A-87 apply...." *E.g., id.* at 1.

By completely ignoring the indirect cost rate agreements, Defendants suggest that the Secretary and IHS were not bound by those agreements, but that is incorrect. Although negotiated and executed by a DOI official,²² that official was "the Responsible Agency for the Federal Government," *id.* at 4, authorized to approve a government-wide indirect cost rate on behalf of the Executive Branch. The IHS has never challenged the Tribe's approved rates, and in fact has referenced them in the shortfall reports. *Compare* Exhibit C at 21 (rate agreement establishing 10.88% indirect cost rate for Tribe for FY 2000) *with* Exhibit D at 3 (IHS shortfall report for FY 2000 calculating Tribe's indirect cost requirement by applying 10.88% rate to direct cost base).

Consistent with the ISDEAA, 25 U.S.C. § 450j-1(c), the ISDEAA regulations, OMB Circular A-87, and the IHS's own CSC policy circulars, the IHS in fact calculated indirect cost requirements for the Tribe by applying its approved rate to the direct cost base. The IHS did not, however, pay 100% of those requirements in any of the relevant years.

²¹ *See also* U.S. Dep't of Health and Human Servs., ASMB C-10, *Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government* (April 8, 1997), which provides government-wide guidance for state, local and tribal governments on implementing OMB Circular A-87 and provides further detail on indirect cost rate proposals in Part 6.

²² From 1995 through 2002, that official was in the Office of Inspector General; in 2003 the indirect cost rate negotiation function was transferred to the National Business Center within the DOI.

D. The IHS Failed to Pay the Tribe's Full Indirect Costs, as Calculated by Applying the Approved Rate, in any of the Years at Issue.

Defendants do not argue that they paid the Tribe's full indirect costs, as calculated by the rate method described above, and appear to concede that they did not. Instead, Defendants argue that their payment of lesser amounts was all the contracts required. Def. MTD at 10-18. As shown above, this argument violates elementary principles of statutory and contract interpretation by rendering the promise of full payment under section 106 a nullity. It also confuses the contractual term governing "Funding Amount" with the "Accounting and Appropriation Data" documenting how much has actually been paid. Because Defendants show only that they paid 100% of what they paid, not 100% of what they owed, their motion to dismiss on the basis of "full performance" should be denied.

The Tribe need not, in this Opposition, document the precise extent of the shortfalls it suffered; that can be done in the damages phase of these proceedings. The IHS has acknowledged shortfalls, as calculated by the rate method, in all of the years for which the Tribe has obtained shortfall reports. *See* Exhibit D at 1 (showing \$61,458 shortfall for Tribe in FY 1997); *id.* at 2 (showing \$17,249 shortfall for Tribe in FY 1999); *id.* at 3 (showing \$81,256 shortfall for Tribe in FY 2000); *id.* at 4 (showing \$87,518 shortfall for Tribe in FY 2001). The Tribe expects to obtain through discovery shortfall reports for the other claim years as well. In any event, the contracts, AFAs, and modifications themselves demonstrate clearly that the IHS did not pay the Tribe's full indirect cost requirement, as calculated by the rate method, in any of the claim years. After acknowledging these shortfalls for years, Defendants have now adopted a post hoc litigation position that there never were any shortfalls, because the promise of full payment in accordance with section 106 was a nullity, and the amounts made available through

the AFAs and amendments were always necessarily exactly what was owed. The court should reject this novel, and wishful, notion of a breach-proof contract, and deny Defendants' motion.

In sum, this is clearly not a case in which the Tribe has presented purely speculative and implausible claims, as required to dismiss under Rule 12(b)(6). *Twombly*, 127 S. Ct. at 1965, 1974.

II. The Tribe Did Not—and Could Not—Waive its Statutory and Contractual Right to Full Indirect Costs, and Is Not Estopped from Asserting that Right.

Defendants argue that the Tribe waived its right to claim additional indirect cost funding by executing and performing the contracts rather than refusing to enter the contracts and appealing the inadequate funding levels. But the relevant funding level to justify an appeal is the amount provided by the end of the contract year, not at the beginning. The Tribe could not have known at the beginning of the year whether it would suffer any indirect cost shortfall at all, let alone the precise extent of that shortfall. The Tribe could not waive its right to full payment by accepting a first installment. Moreover, the right to full CSC is a statutory right that cannot be waived by contract.

A. The Text of the ISDEAA Precludes Tribal Waiver of Statutory Rights.

The equitable doctrine of waiver cannot trump statutory law. "Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void." *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996). When the text of a statute, or its legislative policies, indicates that waiver was not intended, waiver cannot be applied. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (agreement to arbitrate invalid if Congress has indicated intent to preclude waiver of judicial remedies); *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997) (waiver of right to

appeal invalid where it would subvert policies of statute). The text and policies of the ISDEAA preclude waiver of tribal statutory rights such as the right to full CSC.

In its Motion to Dismiss, Defendants can point to no express waiver by the Tribe of its statutory rights. Rather it maintains that the Tribe's failure to object to the AFA and its offer of less-than-full funding (as it turned out) implies a waiver of any claim to additional funding. The ISDEAA does not permit such an implied waiver.

The ISDEAA contains a number of provisions authorizing, and providing a mechanism for, the Secretary to waive applicable regulations when so requested in writing by a tribe. In 25 U.S.C. § 450k(e) Congress provided that "The Secretary may ... waive regulations if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this subchapter and is not contrary to statutory law. In reviewing each request, the Secretary shall follow [declination procedures]." Similarly in 25 U.S.C. § 458aaa-11(b)(2), the statute provides that "Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation...the Secretary shall either approve or deny the requested waiver in writing." *See also* 25 C.F.R. Part 900, Subpart K ("Waiver Procedures"). There is even authority for tribes to agree to what would otherwise be inapplicable agency rules or policies, provided the tribe does so expressly in the compact or funding agreement. 25 U.S.C. § 458aaa-16(e).

But there is no ISDEAA provision for tribes to waive any statutory rights. Because Congress has expressly and thoroughly considered waiver in the statute, and limited it to specific parties and subjects, the ISDEAA must be deemed to preclude its general application beyond these subjects.²³

²³ *See, e.g., Christianson v. Harris County*, 529 U.S. 576, 583 (2000) (noting canon of construction that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other

In those few instances in the ISDEAA where Congress has allowed waiver of regulations, Congress created a procedure requiring that the waiver be expressed in writing from the tribe and that the Secretary expressly agree. If Congress intended to protect tribes from any attempt by the Secretary to waive regulations unilaterally or by a tribe to waive regulations inadvertently, then certainly Congress did not intend to allow an implicit waiver of the statute itself. Moreover, Congress set forth a clear test for waiver of regulations. The Secretary may waive regulations only when the "waiver is in the best interest of the Indians served by the contract or is consistent with the policies of the Act, and is not contrary to statutory law." 25 U.S.C. § 450k(e). In effect, Congress expressly banned a statutory waiver. To imply a waiver of the statute here would go far beyond what is permitted in the statute and would violate the very test Congress set out for the waiver of regulations: it would subject the Tribe to a waiver that is inconsistent with the statute and its own best interest.

B. Tribal Waiver Would Subvert the Purpose and Policies of the ISDEAA, and Is Thus Precluded.

Not only the text, but the policy and purposes of the ISDEAA preclude tribal waivers of statutory rights. The legislative policies underlying a statute may prohibit waiver even when the express language of the statute or contract does not. *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704-05 (1945) (employees' written waiver of right to liquidated damages under Fair Labor Standards Act ("FLSA") not enforceable). In *O'Neill*, the court emphasized that the FLSA was designed to redress the unequal bargaining power between employers and employees, so to allow employees to waive its protections—even expressly and in writing—would thwart the legislative

mode"); *K.P. Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations and internal quotation marks omitted).

intent. *Id.* at 706.²⁴ Similarly, in *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997), a contract provision purported to make the "Award Fee" determination a unilateral Government decision that could not be reviewed under the CDA. The Federal Circuit found that this provision conflicted with the CDA's guarantee of appeal rights and subverted the statute's intent, to equalize the bargaining power of contractors and the Government.

Permitting parties to contract away Board review entirely would subvert this purpose and return contractors to the position they occupied before the passage of the CDA. The government could insert jurisdiction defeating provisions in RFPs and contracts as desired, thus skewing the balance between it and contractors. As a result, contractors would lose the protections sought by Congress in enacting the CDA.

107 F.3d at 858. The specific Award Fee provision did not trump the general dispute resolution provision providing CDA review because there was no statutory warrant for the Award Fee exclusion. "Thus, the CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction, unless the contract provision otherwise depriving jurisdiction is itself a matter of statute primacy." *Id.* at 859.

Like the FLSA and the CDA, the ISDEAA is legislation designed to redress unequal bargaining power: that between the Government and the tribes for whom it acts as trustee. *See* 25 U.S.C. § 450a(b) (declaring policy of ISDEAA to enable transition from "Federal domination" to tribal self-determination). Defendants argue that the specific term of the AFA documenting a dollar amount paid trumps the Tribe's right to full CSC guaranteed by sections 106(g) and 106(a) of the ISDEAA and the contract provisions incorporating these statutory

²⁴ *Accord, Tompkins v. United Healthcare*, 203 F.3d 90, 98 (1st Cir. 2000) (party cannot waive application of preemption provisions of Employee Retirement Income Security Act); *Carter v. Exxon Co.*, 177 F.3d 197, 210 (3d Cir. 1999) (gas station franchisees cannot waive protections granted by federal Petroleum Marketing Practices Act); *Haghighi v. Russian American Broadcasting Co.*, 173 F.3d 1086 (8th Cir. 1999) (inclusion of statutorily-required language in settlement agreement cannot be waived; applying Minnesota law); *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510, 513 (Ind. Ct. App. 1st Dist. 1991) (employee in employment agreement cannot waive benefits of prevailing-wage statutes; "[a]llowing settlement or release of a claim would permit unscrupulous contractors to force employees to submit to economic pressures and accept lower wages"). *See* 15 Corbin on Contracts § 88.7, at 595 (rev. ed. 2003).

terms. Def. MTD at 17 n.5. Allowing the parties to contract away the statutory right to full CSC, however, would directly subvert both the general purpose of the ISDEAA and the specific purpose of section 106.

In the ISDEAA, "Congress declare[d] 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...." 25 U.S.C. § 450a(b). Consistent with the federal trust responsibility, Congress sought to end "Federal domination" of services to Indians by transferring resources and responsibility to tribes. *Id.* Because those resources initially did not include full CSC, so that tribes were forced to cut services to pay overhead, Congress saw its self-determination policy undermined and the statute in need of revision.

In 1988 Congress amended section 106 to address "the consistent failure of federal agencies to fully fund tribal indirect costs." S. Rep. 100-274, 1987 U.S.C.C.A.N. 2620, 2627 (Dec. 21, 1987). The Senate committee emphasized the centrality of full CSC to the core policy of the ISDEAA: "Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed." *Id.* at 2632 (quoted in *Appeals of Cherokee Nation*, 99-2 BCA P 30462 (I.B.C.A. 1999), 1999 WL 440045 at 7). Just as the Government in *Burnside-Ott* could not subvert the policy of the CDA by inserting a contract provision giving it unilateral authority over the Award Fee, the Government here should not be allowed to subvert the ISDEAA with an inconsistent contract provision. If the Government could fix CSC funding at whatever level it wished, despite available appropriations to carry out the statutory mandate of full CSC, tribal contractors would be returned to the

position they occupied before passage of the 1988 ISDEAA amendments, rendering the statute pointless and skewing the Congressionally crafted balance of power.²⁵

If the contracts' full-funding provision is at all ambiguous, the ISDEAA's legislative instructions for interpretation resolve that ambiguity. Each provision of the ISDEAA and the contracts "shall be liberally construed for the benefit of the Contractor." 25 U.S.C. § 450l(c) (Model Agreement § 1(a)(2)); Def. Ex. B at 005, § (a)(2) (contract provision incorporating same rule of interpretation). Congress adopted this interpretive principle in recognition that the ISDEAA is remedial legislation and that a longstanding canon of construction requires that laws for the benefit of Indians must be interpreted liberally in favor of Indians. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005) (ISDEAA to be interpreted liberally in light of remedial purpose); (*Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (applying Indian canon of construction to resolve ambiguity in ISDEAA in favor of tribe). The Tribe could not waive its right to full CSC, even if the Government convinced it to agree to do so, without running afoul of the statutory full funding requirement.

C. The IHS's Cited Cases Do Not Support Waiver of Statutory Rights, and in Fact Recognize that Equitable Waiver Cannot Trump Public Policy Embodied in Statutes.

None of the cases cited by Defendants in their "waiver" argument involves a contract provision at odds with a statute that specifically benefits the class of contractors of which the

²⁵ Defendants also suggest that the Tribe should have suspended performance if the IHS did not provide sufficient funds. Motion to Dismiss at 21 n. 7. First, the Government made this argument in *Cherokee Nation*, and the Supreme Court rejected it, finding that this boilerplate language does not excuse the agency's failure to fully fund a contract. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 638-639 (2005). Second, faced with the choice of suspending health care services to its members altogether, or offsetting a lack of CSC with program funds and/or tribal funds, the Tribe chose the latter option. Defendants' suggestion that the Tribe's choice to use its own funds to continue serving its members should now be used against the Tribe illustrates the extent to which the Government, in developing its litigation position, has lost sight of the Secretary's trust responsibility to Indian tribes and their members.

other party is a member, as here and in *O'Neill and Burnside-Ott*.²⁶ The centerpiece of Defendants' argument is *Hermes Consolidated, Inc. v. United States*, 58 Fed. Cl. 409 (2003). In *Hermes*, the court held that the contractor waived the right to object to a contract provision containing an economic price adjustment (EPA) clause arguably at odds with the Federal Acquisition Regulation (FAR). Significantly, though, the FAR provision was promulgated "for the mutual benefit of both the government and the contractor." *Id.* at 419. The court specifically recognized that equitable principles such as waiver cannot override statutory expressions of public policy, and that the erroneous use of the EPA clause "did not rise to the level of ... being contrary to the statutes of the United States or public policy." *Id.*

Similarly, in *Whittaker Electronic Systems v. Dalton*, 124 F.3d 1443 (Fed. Cir. 1997), the contract included an option provision arguably at odds with a Defense Acquisition Regulation prohibiting option clauses that impose "undue risks" on the contractor. The contractor nonetheless accepted the contract term, presumably after weighing whether the risk was "undue," and performed the contract, thereby waiving the right to protest. No statutory provision or public policy was implicated.

The cases allowing waiver of statutory rights require that the contractor knowingly and affirmatively waive the right by agreeing to a contrary contract term.²⁷ An important distinction between these cases and this is that the Tribe here did not accept any term contrary to the

²⁶ The principle that a contractor is not bound by contract terms in violation of a statute applies with special force when the contractor is part of the group the statute is designed to protect. *Rough Diamond Co. v. United States*, 351 F.2d 636, 639–40 (Ct. Cl. 1965) (citing cases); *Burnside-Ott*, 107 F.3d at 859.

²⁷ *Reservation Ranch v. United States*, 39 Fed. Cl. 696, 712 (1997) (waiver by agreement with contrary term); *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 641 (Fed. Cir. 1989) (same).

ISDEAA; on the contrary, the "Funding Amount" provisions cited above all promised full payment in accordance with section 106.²⁸

In summary, the waiver cases cited by the IHS do not support the application of the waiver doctrine to a specific statutory right protecting the class of tribal contractors of which the Tribe is a member. The text and policy of the ISDEAA fully establish that the Tribe's statutory right to full CSC, as incorporated in the contracts, is not waivable.

D. The Tribe Did Not Waive Its Claim to Full Indirect Costs, Because that Claim Did Not Accrue Until (at the Earliest) the End of the Contract Year.

Defendants' waiver argument might also be less implausible if the Tribe had known, when it entered the contract for each year, (1) what its direct cost base would be for the year; (2) what its approved indirect cost rate would be for the year; (3) what its full indirect cost requirement would be for the year; (4) how much the IHS would pay for indirect costs in that year; and thus (5) whether the Tribe would suffer an indirect cost shortfall, and the extent of the shortfall, in that year. The Tribe could not have known any of these things, however, due to the practice of contract modifications adding funds both to the base and the indirect cost account, and IHS's concomitant incremental payment policy. *Supra*, at 7-8. The Tribe did not expressly waive its right to recover damages for breach of its right to full payment, and Defendants do not point to any express waiver. Thus Defendants take the curious position that the Tribe implicitly

²⁸ Defendants' waiver cases also can be distinguished on the basis that none involves ISDEAA contracts. Section 4(j) of the ISDEAA makes clear that "no contract ... entered into pursuant to Title I of this Act shall be construed to be a procurement contract." 25 U.S.C. § 450b(j). Thus the decisions interpreting government procurement contracts are of doubtful relevance here. Although Defendants misread *Cherokee Nation* as "mandat[ing] that ISD[EA]A contracts be treated as any other procurement contract," Def. MTD at 16, the Supreme Court said nothing of the sort. ISDEAA agreements are as legally binding as procurement contracts, the Court said, *Cherokee Nation*, 543 U.S. at 639, but the Court did not strike down section 4(j) or in any other way imply that Defendants shed their trust responsibility to the Tribe—a responsibility expressly reaffirmed by the Tribe's contracts with Defendants. *E.g.*, Def. Ex. B at 013, § (d)(1) (reaffirming trust responsibility and stating that nothing in the contract is intended to "terminate, waive, modify, or reduce the trust responsibility of the United States to the tribes or individual Indians"); Def. Ex. E at 012-013 (same); Def. Ex. H at 013 (same); *see also* 25 U.S.C. § 450n (providing that nothing in the ISDEAA "shall be construed as ... authorizing or requiring the termination of any existing trust responsibility").

waived its right to recover for breach by accepting partial performance before it could have known that a breach would even occur.

Waiver requires the "intentional relinquishment of a known right." *C.I.T. Corp. v. Carl*, 85 F.2d 809, 811 (D.C. Cir. 1936) (quoting *Oelberman v. Toyo Kisen Kabushiki Kaisha*, 3 F.2d 5, 6 (9th Cir. 1925), *cert. denied* 268 U.S. 693 (1925)); *see also* WILLISTON, CONTRACTS (4th ed. 2000) § 39:22 (citing cases). The Tribe could not have known of its right to additional indirect cost funding, and thus could not have waived that right, until that right came into existence in the first place—at the end of the contract year, at the earliest. Application of this principle distinguishes the cases on which Defendants rely, all of which involve contractors who see a problem (such as an illegal contract clause) prior to execution, yet sign and perform the contract anyway.²⁹ These cases are fundamentally different from the Tribe's case because there was nothing facially objectionable in the contracts the Tribe entered with Defendants. The contracts all promised to pay the amount of indirect funding in the AFA (the first sentence of the "Funding Amount" provision in section (b)(4) of the contracts), and they contained the promise to pay the full amount determined in accordance with section 106 (the second sentence). As it turned out, the indirect cost funding added to the initial contract or AFA by the numerous modifications in each year failed to keep pace with the indirect cost requirements, as discussed above. But the Tribe can hardly be charged with waiving its right to full payment by not filing unripe anticipatory challenges to funding levels that were at the time unknown.

²⁹ *Whittaker Elec. Sys. Dalton*, 124 F.3d 1433, 1446 (Fed. Cir. 1997) (invalid contract clause not challenged prior to execution); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560 (Fed. Cir. 1990) (acceptance of contract provision at variance with statute); *Reservation Ranch v. United States*, 39 Fed. Cl. 696 (1997) (same); *Hermes Consol., Inc. v. United States*, 58 Fed. Cl. 409 (2003) (acceptance of contract clause later challenged as illegal); *E. Walters & Co. v. United States*, 576 F.2d 362 (Cl. Ct. 1978) (same); *Aleutian Constructors v. United States*, 24 Cl. Ct. 372 (1991) (same).

E. The Tribe Is Not Estopped from Claiming Additional Indirect Costs.

Defendants assert that the Tribe's failure to object to the initial contract each year estops the Tribe from now claiming damages, because the Secretary has relied to his detriment on the funding amounts "negotiated" by the parties and included in the agreements. Def. MTD at 22. In fact, however, the Secretary relied to his detriment on a mistaken interpretation of section 106's "subject to availability" language as providing him with discretion to spend less of his unrestricted lump-sum appropriation than required to fully fund tribal contracts, an interpretation the Supreme Court rejected. *Cherokee Nation*, 543 U.S. at 643-44.

The estoppel argument relies on the same faulty premises as the waiver argument: namely, that the Tribe knew in advance of executing the contract how much indirect costs it would be paid and what its shortfall, if any, would be by the end of the contract year. "Had Plaintiffs raised their objections prior to contract execution, the Secretary would have had a full range of options," Defendants state, including litigation, re-negotiation, or simply providing the additional funds. This ignores not only the temporal element of contact funding discussed in detail above, but also the Secretary's policy to limit CSC levels to the amounts recommended in non-binding appropriations committee reports. *Cherokee Nation*, 543 U.S. at 646; *Thompson*, 334 F.3d at 1088. In theory the Secretary could have provided more indirect cost funding had the Tribe objected prior to signing the contract, but as a practical matter he would not have done so. More important, the Tribe simply had no grounds to object before execution to a funding level that was not then known to be inadequate.

Defendants' estoppel cases are no more relevant than its waiver cases, because they all involve acceptance of contract provisions that are clear and final upon execution.³⁰ The Tribe's indirect cost funding amount, by contrast, could only be ascertained after six or nine contract modifications throughout the course of the contract year.

Finally, Defendants' claim of detrimental reliance – which is premised in part on their own unlawful actions - provides no basis for estoppel.³¹ Defendants argue that "if the Court permits Plaintiff to raise its claims now and if it is successful, the Secretary will be responsible for liquidation of all of the original obligations incurred by the Secretary (in reliance on the funding levels provided to Plaintiffs) as well as the obligations that Plaintiff maintains should now be considered part of Plaintiff's agreements." Def. MTD at 23. This is nonsense; the Secretary will simply be liable for damages. Strip away the appropriations jargon, and Defendants' argument boils down to this: If a party pays less than the contract promised, then spends the difference on something else, the other party is estopped from claiming the difference because the first party relied to his detriment on his underpayment. This is not the kind of detrimental reliance that entitles Defendants to invoke the equitable doctrine of estoppel.

F. This Court Should Follow the Seldovia Case, in which the IBCA Rejected the IHS's "Waiver" Argument.

Far more pertinent than the defense acquisition cases cited by Defendants is the *Seldovia* case, which is directly on point. The Seldovia Village Tribe had executed an AFA with

³⁰ *E. Walters & Co. v. United States*, 576 F.2d 362 (Ct. Cl. 1978) (allegedly illegal option clause); *Union Pac. R.R. Co. v. United States*, 847 F.2d 1567 (Fed. Cir. 1988) (allegedly illegal contract term); *Hartford Accident & Indem. Co.*, 130 Ct. Cl. 490 (1955) (contract terms known at time of execution).

³¹ The court in Cherokee made clear that the Defendants interpretation of their legal duty to pay CSC under section 106 of the ISDEAA was not consistent with the law. Defendants' attempts to rely on their past illegal interpretation of the ISDEAA as a basis to invoke the equitable doctrine of estoppel is inappropriate: "[h]e who seeks equity must do equity." *Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 449 (1935) (internal quotation marks omitted); see also *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1312 (D.C. Cir. 1980), *rev'd on other grounds*, 455 U.S. 72 (1982) (defendants' strategy of ignoring contractual obligations constitutes unclean hands weighing against permitting defendant to raise defense overlaid with equitable considerations).

Defendants, including a specified amount for indirect costs, an amount that was fully paid during the contract year. During the year, however, Seldovia had negotiated a new indirect cost rate agreement with DOI that contained a higher indirect cost rate and thus required additional indirect cost funding from the IHS. The IHS refused to amend Seldovia's AFA to reflect the higher rate, and the Tribe appealed to the Interior Board of Contract Appeals ("IBCA").

Just as in this case, the IHS sought to defend itself by saying it paid every dollar in the contracts and Seldovia acquiesced in accepting those amounts. Judge Parrette of the IBCA rejected that argument, ruling that the IHS could not refuse to amend Seldovia's AFAs to reflect its higher indirect cost rate, then claim both full performance and waiver. *Seldovia*, Exhibit E at 9-11.

The Government initially appealed the *Seldovia* case to the Federal Circuit, but later moved to stay the appeal pending the Supreme Court's ruling in *Cherokee Nation*, because *Cherokee* involved, in the Government's own words, "issues almost identical to the ones raised in this appeal." *Thompson v. Seldovia Village Tribe*, No. 04-1230, Unopposed Motion to Stay Appellate Proceedings, at 1 (Fed. Cir. March 2004). The Government abandoned the appeal once the Supreme Court decided *Cherokee Nation*, indicating that the Government understood that the *Seldovia* case, including Judge Parrette's conclusion that Seldovia could not waive its right to full CSC in its agreements with the IHS, to fall squarely within the scope of the *Cherokee Nation* decision.³²

³² It is worth noting that after Seldovia filed a petition for attorneys' fees under the Equal Access to Justice Act in the case, the IBCA awarded the fees, ruling that the IHS litigation position was not "substantially justified"—that is, not reasonable. *Application for Attorney Fees of Seldovia Village Tribe*, Interior Board of Contract Appeals, Nos. IBCA 3862F/97 & 3863F/97, at 3-7 (July 26, 2005). For example, even after the Federal Circuit had affirmed the IBCA's *Cherokee* decision in *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), and the IHS had admitted that the issues in *Seldovia* were "virtually identical with those in *Cherokee*," the IHS stubbornly persisted in appealing to the Federal Circuit. "[A]pparently," Judge Parrette remarked, the "IHS simply was not prepared to take 'No' for an answer." *Id.* at 4, 6. As this case makes abundantly clear, to this day the IHS still is not prepared to take no for an answer.

III. The Tribe's Claims for 1996, 1997, and 1998 Meet the Applicable Statute of Limitations with the Benefit of Class-Action Tolling.

Defendants' motion to dismiss the claims for contract years 1996, 1997, and 1998 should be denied, because Defendants ignore the well-established rule that class actions toll the statute of limitations as to members of the putative class, and do not provide the legal and factual analysis required to meet the stringent Rule 12(b)(1) standard. *See supra*, at 9.

A. The 1996-1998 Claims Were Timely Because the CDA Statute of Limitations Was Legally Tolloed.

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The Court reasoned that without this rule, every potential class member would have to file its own action or motion to intervene in order to protect itself in case class certification were denied, "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551. At the same time, the Court noted that "[t]his [tolling] rule is in no way inconsistent with the functional operation of a statute of limitations." *Id.* at 554.

As described by the Supreme Court in a later case affirming and extending the class-action tolling rule, statutes of limitations "are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights ... but these ends are met when a class action is commenced." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983) (citations omitted).

Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims being

brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."

Id. at 352-53 (quoting *American Pipe*, 414 U.S. at 555).

In *Crown, Cork*, the Supreme Court clarified that tolling extends not only to plaintiffs who intervene in the pending action, but also to would-be class members who file actions of their own. 462 U.S. at 350. The Court stated that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

Numerous courts have held that the tolling announced in *American Pipe* is legal, not equitable tolling, and required by the FRCP. *Stone Container v. United States*, 229 F.3d 1345, 1353-54 (Fed. Cir. 2000) (tolling mandated by statute); *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (legal tolling occurs in class actions); *Schimmer v. State Farm Mutual Automobile Ins. Co.*, 2006 WL 2361810 at *4 (D. Colo. 2006) (class action tolling is a form of legal rather than equitable tolling); *In re Discovery Zone Securities Litigation*, 181 F.R.D. 582, 600, n.11 (N.D. Ill. 1998) (same); *Salkind v. Wang*, 1995 WL 170122, at *3 (D. Mass. 1995) (same); *Mott v. R.G. Dickinson and Co.*, 1993 WL 63445 at *5 (D. Kan. 1993) (same).

In *Stone Container*, the Federal Circuit made it clear that class action tolling is not equitable because it is "mandated by statute" (Rule 23). 229 F.3d at 1353. As such it applies to the Government. "Having determined that Rule 23 tolling is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties...." *Id.* at 1354.

For each of the Tribe's two sets of claims—shortfall and miscalculation—a separate CSC class action tolled the claims. First, a class action filed by the Cherokee Nation tolled the statute

as to the shortfall claims from 1999-2001, then a class action filed the Pueblo of Zuni tolled the statute as to the miscalculation claims from 2001 to 2007.

1. The Shortfall Claims and Cherokee Nation Tolling

The *Cherokee Nation* class action was filed on March 5, 1999, with the proposed class to include "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDEAA] that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present." The Tribe fit squarely within this definition of the proposed class, and had the class been certified, the Tribe would have been bound by any judgment unless it opted out. Thus, under the rule of *American Pipe*, the statute of limitations for the Tribe's individual claims was tolled on March 5, 1999.³³ In a ruling dated February 9, 2001, the court denied the Cherokee motion for class certification. *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). The statute was tolled for one year and 341 days.

Defendants posit that the Tribe's claims accrued at the end of each contract year. Def. MTD at 7. Accepting for the moment that Defendants are correct, the Tribe's 1997 claim accrued on January 1, 1998, the day after the calendar-year contract expired. Ordinarily, then, the Tribe's claim for FY 1997 would have been due by January 1, 2004. Adding the *Cherokee Nation* tolling period, however, pushes the deadline back one year and 341 days, to December 8, 2005. The Tribe filed its claims for 1997 on September 7, 2005, well within the time period.

With the benefit of the tolling period, the Tribe's 1998 claims, also based on a calendar-year contract, could have been filed as late as December 8, 2006 (again, assuming Defendants

³³*American Pipe*, 414 U.S. at 554 ("commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"); *Crown, Cork*, 462 U.S. at 354 ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied.").

are correct about the accrual date). The Tribe filed the 1998 claims on September 7, 2005, some fifteen months before the deadline, even using Defendants' accrual date.

As for the 1996 claim, the Tribe challenges Defendants' assumption that it could not have accrued any later than the end of the contract (calendar) year. A common formulation is that "[a] claim accrues when damages are ascertainable." *Patton v. United States*, 64 Fed. Cl. 768, 774 (2005) (citations and internal quotations omitted); *Terteling v. United States*, 334 F. 2d 250, 255-56 (Ct. Cl. 1964). The Tribe's damages for breach of the 1996 contract were not ascertainable until the end of fiscal year 1997, so it was not until then that the claim accrued. The IHS's fiscal year 1996 appropriation remained available for obligation through the end of FY 1997. *See Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134 (1996), 110 Stat. 1321, 1321-189 ("funding contained herein [for IHS] ... shall remain available for obligation until September 30, 1997"). Moreover, the IHS used this two-year obligation authority to pay CSC on previous years' contracts, including the Tribe's. *See* Def. Ex. D at 016 (adding, in modification to FY 1998 AFA dated September 23, 1998, "\$618 of FY '97 CSC IDC shortfall," along with "\$498 of FY 98 CSC IDC shortfall"). Because the IHS could have made up the 1996 shortfall at any time throughout the following fiscal year, the Tribe's damages were not ascertainable and its claim did not accrue until the end of FY 1997. The claim having accrued October 1, 1997, the Tribe's filing on September 7, 2005 was timely with the benefit of the *Cherokee Nation* tolling period.

Defendants cite *Oceanic S.S. Co. v. United States*, 165 Ct. Cl. 217, 225 (1964) (per curiam) to conclude that the Tribe's claims "accrued by the end of each contract year (which correspond with the calendar year)." Def. MTD at 7. In *Oceanic*, however, the contracts also

expired at the end of a calendar year, but the claims did not accrue until well after that time, when a "final accounting" was completed and the extent of the damages ascertained.

In sum, the Tribe's shortfall claims for 1996-1998 were timely with the benefit of the *Cherokee Nation* tolling period.

2. *The Miscalculation Claims and Zuni Tolling*

The *Cherokee Nation* class action involved only shortfall claims, not miscalculation claims, so *Cherokee Nation* did not toll the statute of limitations as to the latter claims. The statute of limitations on the Tribe's miscalculation claims continued to run until September 10, 2001, when the Pueblo of Zuni filed the first CSC class action against the IHS that asserted miscalculation claims. *See Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M.) ("*Zuni*"). The proposed class included "all tribes and tribal organizations contracting with IHS under the ISD[EA]A between fiscal years 1993 to the present." *Zuni*, First Amended Complaint ¶ 53 (attached as Exhibit F). The Tribe clearly would have been a member of this class, if certified. The Pueblo's amended complaint also describes claims identical to the miscalculation claims eventually brought by the Tribe. *See id.* ¶¶ 66-73 (First and Second Causes of Action for "Undercalculating 'Indirect' Contract Support Costs").³⁴

Because the Tribe was a member of the putative *Zuni* class, and the Tribe's miscalculation claims were subsumed in the class claims, the statute of limitations on the claims was tolled as a matter of law under *American Pipe* and *Crown, Cork*. When the Tribe filed its

³⁴ Because *Cherokee Nation* did not raise miscalculation claims and *Zuni* was the first class action to do so, the Tribe's reliance on *Zuni* as to those claims does not run afoul of the rule against "stacking" or "piggybacking" class action tolling periods. *See, e.g., Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir.1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely."), *cert. denied*, 525 U.S. 870 (1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir.1994) ("Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely.").

own claims on September 7, 2005, the statute was still tolled, as the *Zuni* court did not decide the class certification issue until May 22, 2007.

As Defendants acknowledge, the Tribe could have filed its 1996 claims any time up until the end of calendar year 2002. Def. MTD at 8. Because the statute was tolled over a year before then, and the Tribe filed its claims before the statute began to run again, the Tribe's 1996 miscalculation claim was timely filed. Of course, it follows that the FY 1997 and 1998 claims were also timely with the benefit of the tolling period.

B. In the Alternative, the Statute of Limitations Was Equitably Tolled by the CSC Class Actions.

Generally, if a statute is legally tolled, a court need not address equitable tolling. *Stone Container*, 229 F.3d at 1353; *Schimmer*, 2006 WL 2361810 at *4, n.4. If this Court finds that the statute of limitations was not legally tolled, the Tribe argues in the alternative that the statute of limitations was equitably tolled by *Cherokee Nation* (for the shortfall claims) and by *Zuni* (for the miscalculation claims).

In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court held that a "presumption" of equitable tolling applies to suits against the United States even though a waiver of sovereign immunity is to be strictly construed. Once Congress has made a waiver of immunity, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any broadening of the congressional waiver....We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96. The Supreme Court has confirmed this ruling in several subsequent cases. *E.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002); *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

Under *Irwin*, the presumption in favor of tolling can be rebutted if either (1) tolling would not be applicable in a similar suit between private parties, or (2) Congress did not want tolling to apply.³⁵ The CDA statute of limitations in § 605 may be tolled because under the *Irwin* test, (1) tolling would be available in a similar suit between private parties and (2) Congress did not state any clear intention that tolling not apply.

1. The Tolling Rule Would Apply in a Contract Dispute between Private Parties.

Applying the first prong of the *Irwin* test, the question is whether tolling would apply in a private action when a class action is pending, and we have shown above that it would. Class action tolling is, of course, available in disputes between private litigants, as *Crown, Cork* illustrates.³⁶ The Federal Circuit, applying *Irwin*, has also made clear that class action tolling is available not only to private litigants against other private parties, but also against the Government. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) ("Having determined that Rule 23 tolling is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the Government just as it does to private parties, both generally and in this particular case.").

Class actions involving claims for breach of contract under the ISDEAA have also been established. *See, e.g., Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (class action alleging failure of Bureau of Indian Affairs to fully fund CSC under contracts in violation

³⁵ *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) ("The rule we draw from *Irwin* is that the doctrine of equitable tolling, when available in comparable suits of private parties, is available in suits against the United States, unless Congress has expressed its intent to the contrary.").

³⁶ *See also Irwin*, 498 U.S. at 96 n.3 (citing *American Pipe* as example of cases in which Court has applied equitable tolling doctrine as between non-federal litigants).

of ISDEEA). Courts routinely apply tolling doctrines to breach of contract actions both between private parties and between private parties and the United States.³⁷

Thus the first part of the *Irwin* test has been met. Class action tolling is available to private litigants in breach of contract actions and therefore may apply to the Government.

2. *There is No Evidence that Congress Did Not Intend the Tolling Rule to Apply to 41 U.S.C. § 605(a).*

Because it has become "hornbook law that limitations periods are customarily subject to equitable tolling, ... Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (citations and internal quotation marks omitted). The Supreme Court has explained that analysis of a statute focuses on "*Irwin's* negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (Court's emphasis). Rebutting the *Irwin* presumption in favor of tolling requires positive evidence of Congressional intent otherwise with respect to the particular statute at issue.³⁸

The text of the CDA reveals no indication that Congress intended to rebut the presumption in favor of equitable tolling. Section 605(a) simply says that, "Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). This language does not preclude tolling or any other

³⁷ See, e.g., *NN&R v. One Beacon Ins. Group*, 2006 WL 1765077 at *8 (D. N.J. 2006) (applying New Jersey law to toll statute as to breach of contract claim against insurer); *Bridgeway Corp. v. Citibank, N.A.*, 132 F. Supp. 2d 297, 304 (S.D.N.Y. 2001) (holding that "the statutes of limitations for plaintiff's claims of breach of contract ... are equitably tolled"); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 194 (D. Del. 2000) (tolling Delaware statute of limitations on breach of contract and other claims); *Land Grantors in Henderson, Union & Webster Counties, Ky. v. United States*, 64 Fed. Cl. 661, 712 (2005) (applying *Irwin* to hold that "a breach of contract action brought under the Tucker Act is sufficiently similar to a similar private cause of action that consideration of the doctrine of equitable tolling is appropriate and necessary, particularly where 'harsh and unjust results' may occur if the statute is not tolled.").

³⁸ *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) ("*Irwin* commands that tolling should be presumed absent a clear contrary intent of Congress....") (emphasis added).

background principle of the common law. If anything, starting the running of the statute from "accrual" indicates that Congress intended the limitations period to be flexible under appropriate circumstances. Rather than running from a hard-and-fast date, such as the contract termination date, the statute runs from accrual, which could be delayed if, for example, the contractor did not immediately discover the breach or the damage it caused.³⁹ Tolling, like the discovery rule, must be read into the statute as well, and certainly cannot be read out of the statute absent clear congressional intent under the rule of *Irwin*.

In *United States v. Brockamp*, 519 U.S. 347 (1997), the Supreme Court confirmed the *Irwin* analytical framework and added more detail to the questions to be asked in examining Congressional intent. *Brockamp* considered: (1) the statute's detail and technical language; (2) whether the limitations were reiterated substantively and procedurally; (3) whether explicit exceptions to limitations were included; and (4) the underlying subject matter of the statute. 519 U.S. at 352; *see also Brice v. Secretary of Health & Human Servs.*, 240 F.3d 1367, 1372 (Fed. Cir. 2001). Applying the *Brockamp* factors to the statute in this case, it is clear that the CDA is not "detailed" or "technical" as to the statute of limitations – certainly not to the same extent as the Internal Revenue Code scheme at issue in *Brockamp*. Nor does the CDA reiterate the limitation "several times in several different ways" and in both substantive and procedural forms, as in *Brockamp*, or set forth exceptions for the contractor. 519 U.S. at 351. In fact, the CDA's provision on statute of limitation is very straightforward: there is a single sentence in section 605 that states the six-year limitations period.

If anything, the general purposes of the CDA support the intent to allow tolling, and certainly do not provide any evidence to rebut the *Irwin* presumption. The purposes were "to

³⁹ *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied* 501 U.S. 1261 (1991) (stating that "the 'discovery rule' of federal common law ... is read into statutes of limitations in federal-question cases ... in the absence of a contrary directive from Congress").

provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to government contracts,"⁴⁰ and to "equalize the bargaining power of the parties when a dispute exists."⁴¹ This emphasis on fairness supports the presumption that Congress intended tolling to be available to contractors' claims. These purposes, combined with the lack of any express intent to preclude equitable tolling, provide no basis to rebut the *Irwin* presumption that tolling is available when warranted.⁴² Due to the lack of any Congressional intent to preclude tolling, under *Irwin/Brockamp* the doctrine of equitable tolling applies.

C. *The Bowles Case Is Not to the Contrary.*

Defendants cite the Supreme Court's recent ruling in *Bowles v. Russell*, ___ U.S. ___, 127 S. Ct. 2360 (2007) for the proposition that "[s]tatutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them." Def. MTD at 7. This simplistic statement does not reflect the case's actual holding, which does not impact the cases cited in the tolling arguments above.

⁴⁰ H. R. Rep. No. 95-1556, at 5 (1978).

⁴¹ S. Rep. No. 95-1118, at 1 (1978). This report briefly discusses the 90-day period for appealing the contracting officer's decision: "Section 7 [41 U.S.C. § 606] establishes the time limits available to the contractor to initiate an appeal to an agency board of contract appeals. This time frame (90 days) is considered adequate to insure the contractor the necessary time to review his position and to decide whether to appeal to an agency board." *Id.* at 23. Nothing in this description would appear to indicate any intent to preclude tolling when, for some good reason, 90 days is not adequate.

⁴² The scant legislative history relevant to the six-year limitation period reveals no indication that Congress intended that tolling not apply. As enacted in 1978, the CDA contained no statute of limitations period for presenting claims to the contracting officer (CO).⁴² See, e.g., *Board of Governors of the Univ. of N. Carolina v. United States*, 10 Cl. Ct. 27, 30 (Cl. Ct. 1986) (when first enacted, "the CDA provided no limitations period in which claims must be presented (or certified) to the CO"). In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which amended the CDA, 41 U.S.C. § 605(a), to include the six-year limitation. Pub. L. No. 103-355 § 2351, 108 Stat. 3243, 3322 (Oct. 13, 1994). Neither the FASA itself nor its legislative history discusses the reason for adding the six-year limitation to § 605(a).

Bowles addressed the question of whether the Federal Rule of Appellate Procedure 4(a) and 28 U.S.C. § 2107(c), which set forth the time within which to file an appeal, are jurisdictional and therefore not waivable by a court. The Supreme Court held that because the time frame for filing an appeal is set by statute, it is mandatory and jurisdictional and not subject to equitable waiver.

This ruling is notable for what it does not address. First, it is clearly limited to the issue of the filing of appeals in federal appellate court. Second, the ruling does not address a statute of limitations. The Court does not overrule any case relied upon by the Tribe in its tolling argument above, all of which address the tolling of a statute of limitations rather than an appeal period. The Court in *Bowles* states plainly that it is addressing a time frame set by statute which defines the jurisdiction of a court, not rules for claims processing. 127 S. Ct. at 2364.

The six-year CDA deadline at 41 U.S.C. § 605(a), however, is a garden-variety statute of limitations for presenting claims to the contracting officer.⁴³ The cases are clear—and the Supreme Court's ruling in *Bowles* does not change this clarity—that statutes of limitations, in certain circumstances, may be tolled. The six-year deadline at 41 U.S.C. § 605(a) is just such a statute of limitations. The more analogous section of the CDA to the statute at issue in *Bowles* is 41 U.S.C. § 609, which provides the time frame within which to appeal a contracting officer's decision in court. This section sets the jurisdiction of the district court to hear an appeal which is not an issue in this case.

⁴³ The additional requirement in section 605(a) that claims be presented to the contracting officer has been held jurisdictional, *e.g.*, *Tunica-Biloxi Tribe*, No. 02-2413, slip op. at 10 (D.D.C., Dec. 9, 2003). Although Defendants cite *Tunica-Biloxi* as supporting the jurisdictional nature of statutory time limits, Def. MTD at 7, time limits were not at issue in that case. Instead, this court held that presentment of claims to the contracting officer was jurisdictional. In the instant case, there is no dispute that the Tribe presented its claims; the only question is timeliness.

In his dissent in *Bowles*, Justice Souter makes the crucial distinction between statutes of limitations and statutes limiting jurisdiction of appeals, and the majority does not disagree that such a distinction exists. "The time limit at issue here...is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional. *Day v. McDonough*, 547 U.S. 198, 205 (2006). Statutes of limitations may be waived, *id.*, at 207-208, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)." *Bowles*, 127 S. Ct. at 2369.

While Defendants may wish that *Bowles* stood for the proposition that any limitation period in a statute is jurisdictional and cannot be tolled, it plainly does not. *Irwin* involved a statute, 42 U.S.C. § 2000e-16(c); so did *Young* (11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(A)(i)) and *Brockamp* (26 U.S.C. [Internal Revenue Code] § 6511). *Bowles* does not overrule *Irwin* or any other Supreme Court case on tolling statutes of limitations. The majority simply disagreed with Justice Souter over the nature of the time limitation at issue.

Finally, even if *Bowles* did overrule *Irwin*, *Young*, *Brockamp* et al. *sub silentio*—a dubious proposition⁴⁴—and abolish equitable tolling for every statutory limitation period, that would not affect the Tribe's argument that the statute was legally tolled by the filing of the CSC class action(s).

IV. The Tribe's FY 1995 Claim Is Not Barred by Laches.

The defense of laches requires a showing of (a) unreasonable and unexcused delay by the claimant, and (b) prejudice to the defendant, either economic or in the ability to mount a defense. *Cornetta v. United States*, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (en banc). The burden of

⁴⁴ See, e.g., *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*..."). It is highly unlikely that the Court would overturn a "background principle" of "hornbook law," as the Court referred to the *Irwin* tolling doctrine in *Young*, 535 U.S. at 49-50, without so much as mentioning the rule or the cases in which it developed.

proof rests with the defendant. *Id.* at 1380 (citing FRCP 8(c)). Defendants must satisfy both parts of the test. *Costello v. United States*, 365 U.S. 265, 282 (1961). Here, Defendants have not met their burden on either prong.

A. *The Tribe's Delay in Bringing Its Claims Was Reasonable Given the CSC Class Actions.*

Mere passage of time does not constitute laches. *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993). In fact, "where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief." *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951). Where, as here, Congress has chosen to impose no statute of limitations, courts are reluctant to impose their own equitable limitation. *E.g.*, *CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559, 569 (Fed. Cl. 2004) ("Because Congress did not so limit the jurisdiction of this Court to hear such actions, we would be reluctant to invoke laches except under extraordinary circumstances....").

Defendants state that the Tribe delayed "more than eleven years," Motion to Dismiss at 9, but the Tribe actually submitted its claim to the contracting officer less than ten years from the time Defendants claim it accrued (the end of calendar year 1995). More important, the Tribe's FY 1995 claim was only a little over three years old when the *Cherokee Nation* class action was filed on March 5, 1999. The class action aimed to recover CSC claims for all tribal contractors from 1988 forward. *Cherokee Nation*, 199 F.R.D. at 360. As discussed in detail above, the Tribe's reliance on the class action to vindicate its rights to unpaid CSC in FY 1995 (and the other years) was reasonable as a matter of law.⁴⁵

⁴⁵ See *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-53 (1983) ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims.").

After class certification was denied by the *Cherokee Nation* court in 2001, a second CSC class action was filed by the Pueblo of Zuni, in which the class certification decision was not made until May 22, 2007. *Pueblo of Zuni v. United States*, CIV 01-1046LH (D.N.M.). Even so, the Tribe filed its FY 1995 claims in 2005 rather than rely on *Zuni*.

In sum, at no time during 1995-2005 did the Tribe sleep on its rights. The Tribe's "delay" was reasonable and justified.

B. The IHS Was Not Prejudiced by the Tribe's Delay in Filing its Claims.

Even if the Tribe's delay had been unreasonable and unexplained, which it was not, the IHS would still have to show prejudice, or its laches argument fails. *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951) ("[W]here no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."). The burden of proving prejudice rests with the Defendants. *Cornetta*, 851 F.2d at 1380.

Defendants do not argue that the passage of time hampers their ability to defend against the Tribe's claims, as the written documents on which the FY 1995 claim is based—the contract, its modifications, and the relevant provisions of the ISDEAA—have been readily available to the parties and still say the same things now that they did in 1995. Instead, Defendants present perfunctory allegations of economic prejudice based on the lapse of FY 1995 appropriations at the end of that fiscal year. Def. MTD at 9-10. Under this reasoning, the Tribe's claim would have been just as "prejudicial" if filed in 1996 instead of 2005, since it would have sought to "revive a claim for appropriations that expired." *Id.* at 9. Therefore the delay of which

defendants complain made no difference even under their own logic. Of course, the Tribe is not seeking to "revive" expired appropriations, but only to recover damages.⁴⁶

V. Defendants' Motion to Dismiss the Tribe's Breach of Trust Claim Should Be Denied.

Finally, Defendants' motion to dismiss the Tribe's breach of trust claims should also be denied. As Judge Walton from this court found a few years ago, the ISDEAA expressly acknowledges and reflects the federal Government's trust responsibility. *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 02-2413, slip op. at 37-38 (Dec. 9, 2003). It is true that Judge Walton declined, in *Tunica-Biloxi*, to hold the Secretary liable for breach of that trust by failing to request additional appropriations for CSC from Congress. *Id.* at 39-40. The Tribe does not limit its allegations of breach of trust to appropriations requests, however, alleging broadly that "[t]he Secretary failed to take all steps necessary to fully fund the Tribe's contracts," Complaint ¶ 48—for example, by reprogramming funds from the Department's unrestricted lump-sum appropriation to cover the Tribe's shortfalls. This allegation does not raise the issue of redressability (and thus standing) that was central to Judge Walton's ruling in *Tunica-Biloxi*. Accepting the Tribe's allegations as true, the Tribe's claim is plausible and should not be dismissed under Rule 12(b)(6). *Twombly*, 127 S. Ct. at 1965.

Defendants also argue that sovereign immunity bars the breach of trust claims, because the ISDEAA's waiver of immunity is limited to claims for injunctive relief and money damages arising under contracts. Def. MTD at 25-26. As alleged in the Complaint ¶ 49, however, the Tribe's breach of trust claims arise from and relate to the contracts at issue, and thus fall within the jurisdiction of this Court—and the waiver of sovereign immunity—afforded by section 110

⁴⁶ Defendants assert that their reliance on a limitation of cost provision in the 1995 contract supports their laches defense. Def. MTD at 10 n.3. In *Cherokee Nation*, however, the Supreme Court disagreed with a similar argument based on a boilerplate limitation of cost clause. 543 U.S. at 639-40.

of the ISDEAA. *See* 25 U.S.C. § 450m-1(a). Thus dismissal for lack of subject matter jurisdiction would be inappropriate at this time.

CONCLUSION

For the reasons above, the Tribe respectfully requests that this Court deny Defendants' Motion to Dismiss in its entirety.

Pursuant to Local Civil Rules 7(f) and 78.1, the Tribe requests an oral hearing on Defendants' Motion.

Respectfully Submitted,

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