

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

TUNICA-BILOXI TRIBE OF LOUISIANA;)	
RAMAH NAVAJO SCHOOL BOARD, INC.,)	
)	
Plaintiffs,)	Case No. 1:02CV02413
)	Judge Reggie B. Walton
v.)	Magistrate Judge Deborah A. Robinson
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and Human)	
Services; GALE A. NORTON, Secretary of the)	
United States Department of the Interior,)	
)	
Defendants.)	

DEFENDANTS’ MOTION TO DISMISS

Defendants, by and through undersigned counsel, respectfully move to dismiss the Second Amended Complaint in its entirety for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The facts and law supporting this Motion are set forth in the accompanying Memorandum. A proposed order is also attached for the Court’s consideration and convenience.

Respectfully submitted,

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Counsel for Defendants

Dated: January 13, 2006

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DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs, Tunica-Biloxi Tribe and Ramah Navajo School Board, are parties to self-determination contracts with the Secretary of the U.S. Department of Health and Human Services (“HHS”), as authorized by the Indian Self-Determination and Education Assistance Act (“ISDA”), 25 U.S.C. §§ 450 et seq. Pursuant to their self-determination contracts, Plaintiffs have assumed responsibility for running certain health care programs from the Indian Health Service (“IHS”), an agency of HHS. At issue in this lawsuit are claims that the Secretary annually underfunded certain cost components of Plaintiffs’ contracts.

After considering Defendants’ Motion to Dismiss in 2004, this Court dismissed some of Plaintiffs’ claims and ordered limited jurisdictional discovery. Before the Court was able to determine whether it had jurisdiction to order monetary relief for certain surviving claims, the case was stayed pending a ruling in a related case before the Supreme Court. In early 2005, the

Supreme Court issued a decision in Cherokee Nation v. Leavitt, 543 U.S. 631, ___, 125 S. Ct. 1172, 1178-81 (2005), and held that when (1) the Secretary promised a specific amount in an ISDA contract for indirect CSC (as it had for the Cherokee plaintiffs), and (2) appropriations were legally available for that purpose, the Secretary could not defend against a breach of contract claim by arguing that it had insufficient appropriations. Moreover, the Court held that when Congress appropriated unrestricted, lump-sum appropriations, these appropriations were legally available to satisfy contractual promises. See 125 S. Ct. at 1180.

In light of this Court's 2004 Order and the recent decision of the Supreme Court, Defendants now renew their motion to dismiss and move to dismiss all of the remaining claims for lack of subject matter jurisdiction and for failure to state a claim. Distinct from the breach claims at issue in Cherokee, Plaintiffs are asking this Court to reopen their contracts--all long since performed--and alter their terms and funding amounts to include additional funds on the basis of a purported inconsistency with the ISDA. But not only are the terms and funding amounts in Plaintiffs' contracts fully consistent with the ISDA, Plaintiffs have waived, and are estopped from raising, these overdue claims. The expectations of the parties have long been settled, and IHS no longer has the authority to obligate any additional funding to either Tunica or Ramah's contracts at issue in this lawsuit. By failing to take advantage of the judicial review provisions of the ISDA before the contract was executed, Plaintiffs acquiesced to the funding levels in their contracts and cannot now ask the Court to rewrite them. Under these circumstances, any claims or contentions that the ISDA requires a different level of funding have been extinguished and the terms and conditions of the actual ISDA agreements control the duties of the parties. In other words, "contracting parties must be held to their agreements." Madigan

v. Hobin Lumber Co., 986 F.2d 1401, 1403 (Fed. Cir. 1993).

Although Plaintiffs have exhausted their claims alleging that their agreements are inconsistent with the ISDA, Plaintiffs have not yet exhausted any claims for breach of contract. They have yet to point to any term in any of their contracts that they allege was breached, and IHS has not yet had the opportunity to assess any such claims. Therefore, the Court should decline to review any claims of breach that Plaintiffs may raise in this proceeding for lack of subject matter jurisdiction under the Contract Disputes Act (“CDA”), and either dismiss or remand them for proper presentment.

Any remaining claims related to the indirect cost rate methodology that can be construed from the Complaint should also be dismissed. In the years in which these Plaintiffs have actually negotiated and obtained indirect cost rates, they have acquiesced in the use and validity of these rates in two ways. First, Plaintiffs declined to challenge, through the Department of the Interior’s (“DOI”) appeals procedure, the methodology used by DOI’s National Business Center (“NBC”) to develop their rates. Instead, they agreed to the rates through a formal rate agreement. Second, both Plaintiffs agreed to (and declined to challenge) IHS’s inclusion in their contracts of a term that stated that indirect costs would be calculated on the basis of these NBC rates. At each step of the way, Plaintiffs have refused to use the administrative procedures designed for challenging agency action and instead have agreed to the terms and conditions of their agreements. Accordingly, Plaintiffs have waived any right to challenge the use or validity of these rates.

For those years in which these Plaintiffs do not have rates at all, their claims are unripe. The factual nature of their claims precludes a broad-based challenge to the rate-setting methodology and instead requires a year by year demonstration of actual harm. This Court

should not review these claims without having DOI first make a final determination of the applicable rate for each Plaintiff for each year challenged.

STATUTORY BACKGROUND

The Indian Self-Determination and Education Assistance Act. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDA”), a statute that was designed to encourage Indian self-government by permitting the transfer of certain federal programs to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs both the Secretary of HHS and the Secretary of DOI, upon the request of an Indian tribe, to enter into “self-determination contracts.” See id. § 450f(a)(1); id. § 450b(i) (defining “Secretary”). A self-determination contract is a contract for “the planning, conduct and administration of programs or services which are otherwise provided [by IHS or DOI] to Indian tribes and their members pursuant to Federal law.” Id. § 450b(j).

At issue in this lawsuit are Plaintiffs’ self-determination contracts with the Indian Health Service (“IHS”). IHS provides health care services to American Indians and Alaska Natives throughout the United States, either directly under the Snyder Act and the Indian Health Care Improvement Act, see 25 U.S.C. § 13; 42 U.S.C. §§ 1601, 2001(a), or by providing funding and support to tribes and tribal organizations under ISDA contracts. See Lincoln v. Vigil, 508 U.S. 182, 185, 113 S. Ct. 2024, 2027 (1993). Although the ISDA applies equally to agencies within DOI, this matter involves the duties and responsibilities of the Secretary of HHS and IHS, and thus the statutory references cited hereinafter will refer solely to these parties.

ISDA Contract Formation. Under the ISDA, if a tribe or tribal organization wishes to take over the planning, conduct, or administration of programs or services which are otherwise

provided by IHS, it may submit a request to the Secretary in the form of a self-determination contract proposal. See 25 U.S.C. § 450f(a)(2). The proposal must contain, inter alia, the amount of funding requested for the contract. See 25 C.F.R. § 900.8(h).

Funding under an ISDA contract includes two components—the Secretarial amount and contract support costs (“CSC”). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of health services. See 25 U.S.C. § 450j-1(a)(1) (the “amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs”). Because some of the costs of running a federal program, however, are borne by federal agencies outside of IHS, the Secretarial amount does not necessarily cover all of the administrative or operating expenses of a particular program (e.g., the cost of payroll services for IHS employees). See id. § 450j-1(a)(2). Thus, a self-determination contract generally also includes funding for contract support costs. See id.

CSC can be further broken down into three categories. See id. § 450j-1(a)(3)(A). First, there are direct CSC, which are administrative costs of the contracted-for program, such as unemployment taxes or workers’ compensation insurance. See id. § 450j-1(a)(3)(A)(i); id. § 450b(c). Second, there are indirect CSC, which are administrative costs that are shared by several different programs or services, such as accountants or shared facilities. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). Finally, in the initial year of a contract, CSC include “startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis.” Id. § 450j-1(a)(5). The ISDA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See id. § 450j-1(a)(2). Moreover, the ISDA provides that funding for CSC “shall not duplicate any funding provided [in the Secretarial amount].” Id.

§ 450j-1(a)(3)(A). Finally, all funding under the ISDA is subject to the availability of appropriations. See id. § 450j-1(b) (“Notwithstanding any other provision in [the ISDA], the provision of funds under this subchapter is subject to the availability of appropriations”); see also id. § 450j(c) (same).

Because these funding provisions do not include a specific amount or a specific formula for determining the necessary and appropriate funding levels for any particular contract, the tribe or tribal organization must request specific funding levels in their contract proposal for the Secretarial amount, direct CSC, and indirect CSC. See 25 C.F.R. § 900.8(h).

Once the Secretary has received a proposal, he has 90 days either to (1) approve the proposal and proposed funding levels and award the contract, or (2) issue a written notification declining all or part of the proposal for one of five justifications found in § 450f(a)(2). See 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. The Secretary is directed to approve all severable portions of a proposal. See 25 U.S.C. § 450f(a)(4). If the Secretary does not take action on a contract proposal within 90 days, the proposal is deemed approved. See 25 C.F.R. § 900.18.

Declination of Contract Proposals. The Secretary may decline a contract proposal on one of five statutory bases. See 25 U.S.C. § 450f(a)(2); see also 25 C.F.R. § 900.22 (reciting statutory bases). Notably, one of those bases is “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)” 25 U.S.C. § 450f(a)(2)(D). Because § 450j-1(b) makes all funding subject to the availability of appropriations, the amount that Congress has appropriated for self-determination contracts in each year has always been a key factor in determining the amount of funding that the Secretary has offered to any particular contractor. Since before 1995, Congress has provided

funding each fiscal year to IHS to fund, among other things, self-determination contracts, including CSC. But since at least 1995, the amount appropriated has never been sufficient to meet all of the CSC requests.¹ Therefore, the Secretary has had to decline contract proposals on this basis. See generally Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1310-12 (D. Or. 1997).

In issuing a “declination,” the Secretary must “state any objections in writing,” “provide any assistance to the tribal organization to overcome the stated objections,” and provide the tribal organization with an administrative appeal process. See 25 U.S.C. § 450f(b); 25 C.F.R.

§ 900.31. The tribe or tribal organization may, however, “exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to [25 U.S.C. § 450m-1(a)].” 25 U.S.C. § 450f(b).

Administrative Review Process. A tribe or tribal organization that receives notification of a declination may appeal the decision through an administrative appeals process. See id. § 450f(b). The statute requires that the Secretary make provisions to have a “hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and an opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate[.]” Id. This administrative process is set forth in 25 C.F.R. §§ 900.150-

¹ In fiscal years before 1998, Congress did not limit the amount of funding for CSC directly in the appropriations acts. See Cherokee Nation v. Thompson, 311 F.3d 1054, 1058-59 (10th Cir. 2002), rev’d, 543 U.S. 631 (2005). Instead, IHS allocated funds for CSC on the basis of recommendations in congressional committee reports accompanying the appropriations. See id. Starting in 1998, however, Congress “capped” the amount of funds available for CSC for self-determination contracts, and this capped amount has been the basis for CSC allocations by IHS since then. See, e.g., Dep’t of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997) (Ex. U) (capping appropriation for CSC at \$161,202,000).

900.176. It includes an opportunity for an informal conference or for a more formal appeal to the Interior Board of Indian Appeals. See 25 C.F.R. §§ 900.150-900.176.

Direct Review by a Federal Court. A tribe or tribal organization that receives notification of a declination also may seek direct review in federal court pursuant to 25 U.S.C. § 450m-1(a). See 25 U.S.C. § 450f(b). Section 450m-1(a) gives federal courts the power to review a Secretary's declination decision for its compliance with ISDA and, if the decision is in error, to enjoin the Secretary "to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." Id. § 450m-1(a).

The conclusion of a declination action is either an order affirming the decision of the Secretary or an order compelling the Secretary to enter into a contract. As a result, an ISDA contract is formed if either (1) the parties are in agreement about the terms of the contract and the Secretary awards the contract, or (2) a reviewing court orders the Secretary to award the contract.

The ISDA Contract. Each ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1995, annual funding agreements ("AFA"). See 25 U.S.C. § 450l (providing for a model contract); id. § 450l(c)(e)(2) (providing for written modifications to the contract); id. §§ 450l(c)(b)(4), (c)(f)(2) (providing for an AFA). The funding levels for an ISDA contract are generally described in the AFA.

Although many self-determination contracts remain in effect for more than one year, tribal contractors must submit AFA proposals each year, which are then subject to individualized negotiations between the Secretary and the contractor. See 25 U.S.C. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. Although the ISDA does not contain specific formulas or funding amounts, it requires that the funding level shall not be less than in previous years, with a few exceptions,

including a reduction in appropriations from Congress. See 25 U.S.C. § 450j-1(b)(2); see also 25 C.F.R. § 900.32. If the parties are unable to agree on the appropriate funding level, the Secretary can decline the proposal in part under the declination procedures described above. See 25 C.F.R. § 900.32. The tribal contractors have the right either to seek review through the administrative appeals process or by a direct federal court action. See 25 U.S.C. § 450f(b).

Contract Disputes. Once the parties execute (sign) an ISDA contract and AFA, all disputes arising under it are subject to the Contract Disputes Act (“CDA”). See 25 U.S.C. §§ 450m-1(a), (d). The CDA is found at 41 U.S.C. §§ 601 et seq., and requires, inter alia, that before a claim may be brought in federal court, it must first be timely presented to a contracting officer at the relevant agency. See 41 U.S.C. § 605(a) (“All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision [within six years after accrual of the claim].”); see also 25 C.F.R. §§ 900.215-900.230 (explaining the exhaustion requirement for contract dispute claims brought under the ISDA). This presentment requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim. See SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990); Tunica-Biloxi Tribe v. United States, No. 02-2413, slip op. at 9 (D.D.C. Dec. 9, 2003) (as amended Jan. 22, 2004).

Calculating Indirect Costs. While the ISDA defines indirect CSC and provides that indirect CSC shall be added to the contract pursuant to an annual funding agreement, it does not specify or mandate how the parties will ascertain the amount of indirect cost funding. Although some tribal contractors negotiate indirect costs directly with IHS and others do not incur indirect costs at all, many tribal contractors use a government-wide indirect cost rate (or rates) as a basis

for calculating their indirect costs.

Indirect cost rates are not issued by IHS. They are the result of a negotiation-- independent and separate from contracting under the ISDA--between a government contractor and its “cognizant agency.” See 2 C.F.R. Pt. 225, App. A, § A.6. The cognizant agency for tribal governments is DOI. See id. App. E, § D.1.c. For other tribal organizations, the cognizant agency is the agency that awards the “largest amount of Federal funds.” Id. App. E, § D.1.b. DOI is Tunica and Ramah’s cognizant agency. See Declaration of Deborah A. Moberly ¶ 3 (attached as Ex. AA).² Since January 3, 2003, the agency within DOI responsible for rate negotiation has been the National Business Center (“NBC”). (Moberly Decl. ¶ 3.) Prior to that time, this function was handled by DOI’s Office of the Inspector General (“OIG”). (Moberly Decl. ¶ 3.)

The indirect cost rate negotiation is guided by general cost principles set forth in circulars developed by the Office of Management and Budget, OMB A-21 (for educational organizations), OMB A-87 (for state, local, and tribal governments), and OMB A-122 (for nonprofit organizations), which are published in the Code of Federal Regulations. See generally Arizona v. Thompson, 281 F.3d 248, 144 (D.C. Cir. 2002); Alabama v. Shalala, 124 F. Supp. 2d 1250, 1253 (M.D. Ala. 2000). As this action involves tribal governments, the relevant circular is OMB-87. OMB A-87 provides guidance on the reasonableness, allowability, and allocability of

² With respect to Defendants’ Exhibits, this Memorandum references Exhibits A-AA. Exhibits A-Z were filed by Defendants on March 31, 2003, in paper copy in Support of Defendants’ (Original) Motion to Dismiss. The Notice of Filing of Bulky Exhibits is docketed as #17. Defendants have not re-filed these exhibits, but have provided courtesy copies to Chambers and Plaintiffs’ counsel. Exhibit AA was filed on January 13, 2006, in conjunction with Defendants’ (Renewed) Motion to Dismiss.

indirect costs. See id. It aims to equitably allocate indirect costs to programs (federal, state, private, and/or tribal) that benefit from shared administrative costs. See id. OMB A-87, however, is not intended “to identify the circumstances or dictate the extent of Federal and [contractor] participation in the financing of a particular program or project.” 2 C.F.R. Pt. 225, App. A, § A.1; see also Maine v. Shalala, 81 F. Supp. 2d 91, 96 n.4 (D. Me. 1999) (noting that provisions of law explicitly supercede general cost principles in circulars).

Application of OMB A-87 to a contractor’s unique circumstances yields an indirect cost rate or rates. An indirect cost rate is the ratio, expressed as a percentage, of (1) the total indirect costs (shared administrative services) incurred by the contractor, to (2) the direct cost base (the direct program funding for all of the programs and services that are supported by the shared administrative services).³ See 2 C.F.R. Pt. 225, App. E, § B.2. There are also a few different types of rates. Relevant here, OMB A-87 provides for a “fixed” rate, often called a “fixed-with-carry-forward” rate, which is a rate that is based both on an estimate of the costs to be incurred for the applicable period and on an adjustment (called a carryforward) that takes into account the

³ A (very simple) example of the formula and its application is as follows:
Facts: Contractor A has three contracts to provide various programs for its members: one with the Department of the Interior to provide law enforcement services, one with the Indian Health Service to run a health clinic, and one with another federal agency to run a housing program. The direct program costs associated with the law enforcement contract are \$100,000. The direct program costs associated with the health clinic are \$500,000. The direct program costs associated with the housing program are \$200,000. To support these programs, Contractor A rents one building and employs two accountants to provide accounting services for the three programs. The rent for the building is \$10,000 and the salary for each accountant is \$25,000.
Application of Indirect Cost Formula. To arrive at the indirect cost rate, (1) all of the direct program costs are calculated, for a total of \$800,000, (2) all of the indirect costs are calculated, for a total of \$60,000. The indirect costs divided by the direct cost base results in an indirect cost rate of 7.5%. Thus, the indirect costs associated with the law enforcement program are \$7,500 (\$100,000 x .075), the indirect CSC associated with the health clinic are \$37,500 (\$500,000 x .075), and the indirect CSC associated with the housing program are \$15,000 (\$200,000 x .075).

difference between the estimated costs from an earlier period and the actual costs from that earlier period. See id. App. E, §§ B.5, B.6.

A tribal contractor that wishes to obtain an indirect cost rate (or rates) must first submit an indirect cost rate proposal to its cognizant agency. See id. App. E, § D.1.a. The proposal “must be developed (and, when required, submitted) within six months after the close of the [contractor’s] fiscal year, unless an exception is approved by the cognizant Federal agency.” Id. App. E, § D.1.d. The circular sets forth the proposal requirements. See id. App. E, § D.2.

Once the contractor has submitted an indirect cost rate proposal, the cognizant agency will review, negotiate, and ultimately approve an indirect cost rate. See id. App. E, § E.1. A rate agreement is then signed by the contractor and a representative of the cognizant agency. See id. App. E, § E.3. Once the agreement is signed, the rate is available to all federal agencies for their use as agreed to under any particular contract or grant agreement. See id.

Dispute Processes. OMB also provides for a dispute resolution process in the event that there is a disagreement between the government contractor and the cognizant agency in negotiating a rate. “If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency and the [contractor], the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.” Id. App. E, § F.4. The appeals procedure for DOI is found at 43 C.F.R. §§ 4.1 et seq.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs. Tunica-Biloxi Tribe of Louisiana (“Tunica”) is a federally-recognized Tribe located in the State of Louisiana. (2d Am. Compl. ¶ 8.) Since before 1995, Tunica has had a self-determination contract with the Secretary to run a comprehensive health service program

for its members. (2d Am. Compl. ¶ 8.) Tunica's contracts at issue in this case cover fiscal years 1995-2001 (a 1995 Contract attached as Ex. I, a 1996 Contract in effect until 2000, with accompanying annual funding agreements, attached as Ex. J, and a 2000 Contract, in effect throughout 2001, with accompanying annual funding agreements, attached as Ex. K). Tunica negotiated and signed fixed-with-carry-forward indirect cost rate agreements for the years 1995 (53.23%) and 1996 (54.78%). (Moberly Decl. ¶ 4.) Tunica has not obtained an indirect cost rate for any year after 1996. (Moberly Decl. ¶ 6.)

The other plaintiff, Ramah Navajo School Board ("Ramah"), is a New Mexico non-profit corporation established by the Ramah Navajo Chapter of the Navajo Nation. (2d Am. Compl. ¶ 9.) Since 1976, Ramah has had a self-determination contract to run a health clinic. (2d Am. Compl. ¶ 9.) Ramah's contracts at issue in this case cover fiscal years 1995-1996 (a 1995 Contract in effect in 1995 and 1996, attached as Ex. M). Ramah has negotiated and signed fixed-with-carry-forward indirect cost rate agreements for the years 1995 (25.8%), 1996 (21.3%), 1997 (17.2%), 1998 (20.49%), 1999 (19.33%), 2000 (18.40%), 2001 (17.30%), 2002 (17.04%), and 2003 (15.55%). (Moberly Decl. ¶ 8.)

Tunica's Administrative Claims. On April 2, 2001, and September 27, 2001, Tunica submitted contract dispute claims to IHS in the amount of \$309,008 related to their contracts and AFAs in effect between 1995 and 2001. (Ex. B, C.) Tunica raised three legal theories to support its claims. The first was that IHS had under-awarded indirect CSC generated by its indirect cost rate. (Ex. B, C.) The second theory challenged the calculation of its indirect cost rate on the basis that the methodology used to generate the rate allegedly diluted Tunica's rate. The third theory also challenged the methodology as failing to make proper adjustments to the rate for

under-recoveries. (Ex. B, C.) The details of Tunica's claims are outlined in the following table.

	Under-award (alleged) of rate- generated amount	Rate calculation (alleged rate dilution)	Rate calculation (carry forward computation)	Total	Record Citation
1995	\$5,768.00	\$13,938.00	\$8,206.00	\$27,912.00	Ex. C
1996	\$24,683.00	\$15,221.00	\$8,965.00	\$48,869.00	Ex. B
1997	\$21,220.00	\$14,966.00	\$8,815.00	\$45,001.00	Ex. B
1998	\$31,600.00	\$15,893.00	\$9,361.00	\$56,854.00	Ex. B
1999	\$14,706.00	\$15,513.00	\$9,138.00	\$39,357.00	Ex. B
2000	\$29,566.00	\$15,906.00	\$9,369.00	\$54,841.00	Ex. B
2001	\$12,036.00	\$15,191.00	\$8,947.00	\$36,174.00	Ex. B
Total	\$139,579.00	\$106,628.00	\$62,801.00	\$309,008.00	

Ramah's Administrative Claims. On August 31, 2001, Ramah submitted contract dispute claims to the IHS in the amount of \$442,998 related to their contracts in effect between 1993-1996. (Ex. E.) Ramah raised two legal theories to support their claims. The first was that IHS had under-awarded it indirect CSC generated by its indirect cost rate. (Ex. E.) The second theory challenged the calculation of its indirect cost rate on the basis that the methodology used to generate the rate allegedly diluted Ramah's rate. (Ex. E.) The details of Ramah's claims are outlined in the following table.

	Under-award (alleged) of rate generated amount	Rate calculation (alleged rate dilution)	Total	Record Citation
1993	\$15,300.00	\$13,028.00	\$28,328.00	Ex. E
1994	\$18,324.00	\$12,075.00	\$30,399.00	Ex. E
1995	\$205,817.00	\$68,644.00	\$274,461.00	Ex. E
1996	\$57,647.00	\$52,163.00	\$109,810.00	Ex. E
Total	\$297,088.00	\$145,910.00	\$442,998.00	

IHS denied Tunica's CDA claims on May 3, 2002. (Ex. D.) IHS denied Ramah's CDA claims on December 18, 2001. (Ex. F.) This lawsuit followed.

The Complaint. This case was originally filed in the District of New Mexico, but before the Defendants answered, Plaintiffs moved for voluntary dismissal in New Mexico and re-filed their Complaint here in the District of Columbia. The operative complaint is the Second Amended Complaint, filed February 26, 2003. The Second Amended Complaint describes this suit as one "for breach of contract under the Contract Disputes Act, 41 U.S.C. § 601 et seq., and the special jurisdictional provisions of the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §§ 450-450n. . . ." (2d Am. Compl. ¶ 1.) It claims that Defendants violated the funding provisions of the ISDA applicable to indirect CSC under the three legal theories raised by Plaintiffs in their CDA claims. (2d Am. Compl. ¶ 1.)

The First and Second Claims for Relief allege breach of contract, but divide the claims into two separate categories: claims for funding in years prior to fiscal year 1998, and claims for funding in 1998 and years thereafter. (2d Am. Compl. ¶¶ 34-41.) The Third Claim for Relief alleges breach of trust. (2d Am. Compl. ¶¶ 42-46.) As relief, Plaintiffs seek "money damages for underpayment of Indirect Contract Support Costs", a declaration that the "methods employed by the Defendants for computing and paying each class members' entitlement to Indirect Contract Support Costs" are in violation of the ISDA and in breach of contract, and accordingly, an injunction. (2d Am. Compl. at 15-16.)

This Court's Order of January 22, 2004. On March 31, 2003, Defendants filed a Motion to Dismiss the Second Amended Complaint (docketed as #13). In that Motion, Defendants argued lack of subject matter jurisdiction over all of the claims on three primary grounds: First,

Defendants argued that many of the claims had not been “presented” to the IHS via the CDA’s administrative process. Second, that Plaintiffs had filed their claims for monetary relief too late, as the relevant appropriations had all lapsed as a matter of law. And third, that Plaintiffs could not challenge the rate methodology as they did not have current indirect cost rates. Finally, Defendants also moved to dismiss the breach of trust claims on jurisdictional and merits grounds.

In a Memorandum Opinion of December 9, 2003, amended January 22, 2004, the Court dismissed parts of the First and Second Claims for Relief and all of the Third Claim for Relief (docketed at #48). Specifically, the Court held that the ISDA, 25 U.S.C. § 450m-1(d) made all contract disputes subject to the CDA, and that compliance with the CDA is a jurisdictional prerequisite to a suit for money damages under the ISDA. (Opin. at 8-10.) The Court held that each claim for breach for each year must be properly presented. (Opin. at 13-15.) The Court then dismissed all claims not presented to an IHS contracting officer, noting that Plaintiffs had already conceded that no claims prior to fiscal years 1995 were at issue in this suit. (Opin. at 9-10, 15.) Thus, all that remained to be adjudicated were Tunica’s claims related to fiscal year 1995-2001 funding (covering parts of the First and Second Claim for Relief), and Ramah’s claims related to fiscal year 1995 and 1996 funding (covering parts of the First Claim for Relief only). (Opin. at 15, nn.13, 17.)

For purposes of resolving the remaining claims and assessing the extent of its jurisdiction to award monetary relief, the Court ordered limited jurisdictional discovery and supplemental briefing into the factual availability of appropriated funds for years at issue in this suit. (Opin. at 26.) The Court also ordered supplemental briefing on “whether there was an agreement between the parties that a certain rate would be applicable to fiscal years subsequent to 1996, in the

absence of a new agreement.” (Opin. at 29.) All other claims related to the Secretary’s alleged duty to request additional appropriations for CSC (couched as breach of contract in the First and Second Claims for Relief, and as breach of trust in the Third Claim for Relief) were dismissed. (Opin. at 37-40.) Upon reconsideration of the dismissal of all claims related to the Secretary’s duty to request additional appropriations, the Court reaffirmed its prior holdings. See Jan. 22, 2004 Opin. (docketed as #45.)

The parties thereafter conducted limited jurisdictional discovery, but before re-briefing the remaining issues, the Supreme Court granted certiorari in Cherokee Nation v. United States. The Court stayed this case pending Cherokee’s resolution.

Cherokee Nation v. United States. In Cherokee Nation, the Supreme Court first had to determine the nature of an ISDA contract. See 543 U.S. 631, ___, 125 S. Ct. 1172, 1178-79 (2005). The government had argued that an ISDA contract is not a contractually binding agreement, but a unique, government-to-government agreement to which general contract law did not apply. See id. at 1178. Rejecting this argument, the Court held that ISDA contracts are like any other procurement contract in which the government is bound by its promises. See id. Next, the Court had to assess a defense raised by the Secretary to the specific contracts at issue in that case, e.g., that the Secretary did not have sufficient appropriations to pay the amounts promised in the plaintiffs’ contracts. See id. at 1179-81. It was undisputed that the Secretary had failed to pay the funding amounts in the contracts of the two Cherokee plaintiffs. See id. at 1177 (“The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay.”). Given these circumstances, the Court held that (1) when the Secretary promised a specific amount in an ISDA contract for indirect CSC, and (2) when

appropriations were legally available for that purpose, the Secretary could not defend against a breach of contract action by arguing that it had insufficient appropriations. See id. at 1178-81. Moreover, the Court held that when Congress appropriated an unrestricted, lump-sum appropriation, that appropriation was legally available to satisfy contractual promises. See id. at 1180.

After the Supreme Court's decision, the stay was lifted in this case, and on December 12, 2005, the Court ordered Defendants to file any appropriate dismissal motions.⁴

STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a claim on the ground that the court lacks jurisdiction over the subject matter. Where necessary, "the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."⁵ Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992).

Accordingly, a motion to dismiss for lack of subject matter jurisdiction that relies on matters outside the pleadings, such as a declaration or other documents, should not be converted to a Rule 56 motion for summary judgment. See Fed. for Am. Immigration Reform, Inc. v. Reno,

⁴ Soon after the Cherokee decision, Plaintiffs unsuccessfully attempted to consolidate this case with other cases pending in the District of New Mexico, first by moving for transfer and consolidation under the multi-district litigation statute, 28 U.S.C. § 1407, and then by moving to intervene and file an identical complaint in Pueblo of Zuni v. United States, No. 01-1046 (D.N.M.). The Judicial Panel for Multi-District Litigation unanimously denied the motion to transfer and consolidate (Order docketed as #75). Likewise, the Zuni Court denied Plaintiffs' motion to intervene.

⁵ The only facts outside of the Complaint and documents incorporated therein on which this Memorandum relies are found in the declaration of Deborah Moberly, attached as Exhibit AA.

897 F. Supp. 595, 600 n.6 (D.D.C. 1995), aff'd, 93 F.3d 897 (D.C. Cir. 1996); see also 5A Charles A. Wright & Arthur R. Miller, Fed. Practice & Proc. § 1366 at 484-85 (2d ed. 1990) (explaining that attaching documents to a Rule 12(b)(1) motion does not convert it to one for summary judgment).

A motion to dismiss for failure to state a claim should be granted where the complaint fails to “state a claim upon which relief may be granted.” Fed. R. Civ. P. 12(b)(6). A court may grant a Rule 12(b)(6) motion when it appears that there is no set of facts under which the plaintiff would be entitled to relief. See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997). In deciding a motion to dismiss under Rule 12(b)(6), a court “may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice.” Id. Because Ramah and Tunica’s self-determination contracts, indirect cost rate agreements, and Contract Disputes Act claims are central to their allegations and are referenced in the Second Amended Complaint, (2d Am. Compl. ¶¶ 1, 4, 7, 20, 25, 34-41), they are incorporated therein.⁶ See id.; Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (incorporating into the complaint contractual documents that formed the core of the complaint); Cable v. New York State Thruway Auth., 4 F. Supp. 2d 120, 124 (N.D.N.Y. 1998) (incorporating underlying administrative claim); Wright & Miller, at § 1327.

Affirmative defenses also may be raised on motions to dismiss if the complaint sets forth any facts necessary to make out the defense. See Smith-Haynie v. District of Columbia, 155 F.3d

⁶ All of the contracts and modifications are attached as Exhibits I-M. The annual funding agreements, which are part of the contracts, are attached as Exhibits N and O.

575, 578 (D.C. Cir. 1998); Wright & Miller at § 1357.

ARGUMENT

I. ALL CLAIMS AGAINST SECRETARY LEAVITT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR FAILURE TO STATE A CLAIM.

Plaintiffs, in their Complaint, allege breach of contract. (2d Am. Compl. ¶¶ 34-41.)

“When performance of a duty under a contract is due[,] any non-performance is a breach.”

Restatement (Second) of Contracts § 235 (2d ed. 1981). The claims that Plaintiffs presented to an IHS contracting officer, however, did not address the duties and conditions contained within the four corners of their contracts. (Ex. B, C, E.) Plaintiffs instead presented claims that the funding levels and funding terms of their annual funding agreements violated the funding provisions of the ISDA. (Ex. B, C, E.) Thus, in essence, they asked IHS to “reopen” their agreements, years after execution and performance, rewrite the terms and conditions of their contracts, and then award monetary relief. IHS denied the claims. Such a request is contrary to the general rule that contracting parties must be held to their agreements. See Madigan, 986 F.2d at 1403.

First, the Court lacks jurisdiction over any claims for breach of contract that Plaintiffs might wish to litigate here because they have not yet properly presented any such claims pursuant to the mandatory requirements of the CDA. Second, none of the funding levels or funding terms in Plaintiffs’ agreements violate ISDA’s funding provisions. Finally, Plaintiffs have long since waived (and are estopped from raising) such claims.

A. Plaintiffs Have Not Properly Presented Any Breach of Contract Claims to an IHS Contracting Officer as Required Under the Contract Disputes Act.

The Court should dismiss or remand for lack of subject matter jurisdiction any breach of contract claims that Plaintiffs may wish to litigate in this action. As this Court already held in its December 9, 2003 Memorandum Opinion, ISDA's jurisdictional provision, 25 U.S.C. § 450m-1(a), authorizes courts to review claims for money damages under the CDA. See 25 U.S.C. §§ 450m-1(a), (d). Under the CDA, a prerequisite to judicial review is timely and proper presentment of any claims to a government contracting officer. See 41 U.S.C. § 605(a); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990). Because Plaintiffs failed to present any claims for breach of contract to a contracting officer at IHS, (Ex. B, C, E), this Court lacks jurisdiction to review any such claims alleged in the Second Amended Complaint (2d Am. Compl. ¶¶ 34-41). Thus, the Court should dismiss or remand to IHS any breach claims that Plaintiffs may wish to litigate. Because Plaintiffs did present their claims that their agreements conflicted with ISDA, the Court has subject matter jurisdiction over them but, for the reasons that will be discussed, those claims should be dismissed as well.

B. The Funding Levels of Plaintiffs' Agreements Do Not Conflict With the Funding Provisions of the ISDA.

The Court should dismiss for failure to state a claim Plaintiffs' claims that their agreements are inconsistent with the ISDA. Contrary to Plaintiffs' allegations, (2d Am. Compl. ¶¶ 14-18), there is nothing inconsistent between Plaintiffs' annual funding agreements and ISDA's funding provisions. In their agreements, Plaintiffs and the Secretary agreed to specific funding levels (e.g., the Secretary promised an amount of funding for indirect CSC) and specific funding terms (e.g., the calculation of indirect costs was based on the contractors' approved

indirect cost rate agreement). An agreement that incorporates these types of terms does not violate the ISDA in any way. In fact, reducing the general requirements of the ISDA to specific and enforceable terms comports with the text and purpose of the statute.

The ISDA does not mandate that a specific amount of indirect CSC or a specific formula for calculating indirect CSC be included in a contractor's annual funding agreement. Instead, the ISDA directs the Secretary to add to the contract or annual funding agreement the amount to which the contractor is entitled under 25 U.S.C. § 450j-1(a). See 25 U.S.C. §§ 450j-1(g), 450l(c)(b)(4). As relevant to indirect CSC, § 450j-1(a) provides:

- (a) Amount of funds provided . . .
- (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 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 subchapter 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 subsection (a)(1) of this section.

Id. § 450j-1(a). All funding under the ISDA is subject to the availability of appropriations. See id. § 450j-1(b).

As a starting point, the terms “reasonable” and “allowable,” as used in these funding provisions, are general terms. They do not direct IHS to promise a certain amount of indirect CSC or to use a certain formula for the funding of indirect CSC. See, e.g., Samish Indian Nation

v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (explaining that the funding provisions of the ISDA do not curtail the Secretary’s discretion to pay funds, do not have clear standards for the payment of funds, do not specify precise amounts to be paid, and do not compel the payment of funds). In addition, because all funding is subject to the availability of appropriations, see 25 U.S.C. §§ 450j-1(b), 450j(c), reading into these funding provisions a requirement to fund a specific amount is contrary to their explicit terms.

Instead, the amounts of indirect CSC must be “determined.” See 25 U.S.C. § 450l(c)(b)(4). The ISDA leaves the “determination” of indirect CSC funding to the parties pursuant to a negotiation. See id. §§ 450j-1(a)(3)(B) (providing tribe or tribal organization the ability to negotiate with the Secretary on an annual basis the amount of funds that it is entitled to receive); § 450l(c)(a)(14) (annual funding agreements subject to negotiation); § 450j(c)(2) (“The amounts of [self-determination contracts] may be renegotiated annually to reflect changed circumstances and factors”); § 450l(a) (self-determination contracts shall contain or incorporate the model contract and “such other provisions as are agreed to by the parties”); § 450j-1(b)(2)(C) (funds may be reduced pursuant to a tribal authorization); § 450j-1(b)(5) (Secretary may increase funds promised upon request by a tribal organization); see also id. § 450f(b) (requirement that Secretary work with tribe or tribal organization to overcome objections to the proposal).

In fact, the ISDA directs that the parties work together to “determine” the amount of funds to be included in an annual funding agreement. In this respect, it is incumbent on the tribe or tribal organization to propose the specific funding levels and funding terms to be included in its contract or AFA, see 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B); 25 C.F.R. §§ 900.12, 900.8(h),

and it is incumbent on the Secretary to ensure that total funding promised in self-determination contracts not exceed available appropriations, see 25 U.S.C. §§ 450j-1(b), 450j(c); see generally Cherokee Nation, 125 S. Ct. at 1180; Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed. Cir. 1999).

The ISDA further specifies that, upon receipt of a contract proposal, if the Secretary agrees to the terms provided by the tribe or tribal organization, the contract will be executed, without further review. See 25 U.S.C. § 450f(a)(2) (if the Secretary approves the contract proposal, he will award the contract). If the Secretary declines the proposal, the ISDA gives the tribe or tribal organization two statutory options: (1) it can challenge the Secretary's declination in an administrative proceeding or directly in federal court as inconsistent with the ISDA, see id. § 450f(a)(2), or (2) it can acquiesce to the terms offered by the Secretary and accept the contract and funding thereunder. The actual funding amount is thus determined by an agreement by the parties, see id., or by a court order directing the Secretary to accept the proposal of the tribe or tribal organization, see id., id. § 450m-1(a). Once the funding amounts are "determined" by a contract entered into in one of these two ways, the parties are bound by them.

By providing tribe and tribal organizations with these two statutory options, the ISDA recognizes that the tribe or tribal organization is in the best position to know the amount of funding that it needs in order to perform under the contract and provides that, for ongoing contracts, it need not perform the contract if sufficient funds are not offered. See id. § 450l(c)(b)(5). The policy underlying the ISDA and self-determination policy is that tribes and tribal organizations should be permitted to administer the programs and services that the

government would otherwise administer because tribes and tribal organizations are in the best position to know their requirements. See generally id. §§ 450, 450a.

The availability of the generous judicial review provisions in the ISDA demonstrate Congress's intent that if there is a dispute between the parties regarding the funding levels or funding terms, the tribe or tribal organization must take advantage of the judicial review procedures and challenge the funding levels proposed by the Secretary before contract execution. Once the parties have negotiated and executed a contract, the contract governs the rights and duties of the parties. Thereafter, Congress intended that the parties could enforce the rights and duties under the contracts pursuant to the CDA. See id. §§ 450m-1(a), (d).

Because Plaintiffs could have challenged the amount of funds offered by the Secretary in each year, but instead accepted the Secretary's offers, there can be no violation of the ISDA. Tunica's 1995 funding agreement provided that the Secretary would award \$318,590 for the entire contract (including CSC). (Ex. I at 1.) Tunica's 1996-2000 annual funding agreements included specific amounts for indirect CSC, respectively \$158,832, \$162,691, \$163,061, \$176,273, and \$122,262. (Ex. J at 23, 79, 101, 158; Ex. K at 20.) Modifications to their 2000 annual funding agreement promised additional funding, including funding for indirect CSC, in specific amounts throughout 2001. See, e.g., Ex. K at 35-38. Each of Tunica's agreements also contained a term that stated that indirect CSC would be based upon an indirect cost rate as calculated by DOI, without adjustment or re-calculation.⁷ (Ex. I at 32; Ex. J at 23, 79, 101, 158;

⁷ For example, Tunica's 1998 annual funding agreement stated:
The Tribe does have an approved Indirect Cost Rate for the period beginning January 1, 1997. The fixed carry forward rate of 54.78% is the Tribe's latest approved rate. The tribe will be reimbursed using the approved percentage rate of 54.78% applied to total direct cost for the Indirect Cost Rate for this contact [sic]

Ex. K at 20.) Each of these contracts and annual funding agreements was executed and signed by a Tunica representative and an IHS contracting officer. (Ex. I at 1; Ex. J at 21, 24, 80, 102, 159; Ex. K at 18, 20.)

Likewise, Ramah's 1995 annual funding agreement provided:

Indirect Contract Support Costs are to be initially funded at \$328,505 which is currently available in the Area. The balance of Indirect Contract Support Cost funding required, in accordance with the Contractor's approved negotiated indirect cost rate, shall be requested from Headquarters and provided to the Contractor before September 30, 1995. Funding of the balance needed shall be subject to the availability of appropriations.

(Ex. M at 19, §§ d.1.ii.) Ramah's 1996 annual funding agreement states:

Indirect Contract Support Costs are to be initially funded at \$336,720, which is currently available in the Area. The balance of Indirect Contract Support funding required, in accordance with the Contractor's approved negotiated indirect cost rate, shall be requested from Headquarters and provided to the Contractor before September 30, 1996. Funding of the balance needed shall be subject to the availability of appropriations.

(Ex. O at 22, § d.1.i.) Both of these annual funding agreements were executed and signed by a Ramah representative and an IHS contracting officer. (Ex. M at 1; O at 11, 24.)

As the ISDA does not mandate the payment of a specific amount of indirect CSC, it is imperative that the parties reduce the general funding provisions into concrete funding terms under an agreement. And this is exactly what occurred here, a result mandated by the ISDA and one entirely consistent with the Supreme Court's recent decision in Cherokee Nation. At issue in Cherokee was not whether the plaintiffs' contracts could be re-opened and augmented years after execution and performance; Cherokee was a breach of contract action in which the government

period. According to the current IHS estimate \$163,016.00 will be available for the indirect program costs, which leaves a short fall [sic] of \$11,411.00. (Ex. J at 101, § 2.E.)

admitted that it did not pay the amounts set forth in the contracts (based on its belief that there were insufficient funds). See 125 S. Ct. at 1178. In this case, Plaintiffs, like the government in Cherokee, must be held to the promises they made. Their contentions to the contrary can thus be readily dismissed.

Plaintiffs' first claim, that the funding provisions of the ISDA require the Secretary to award the full amount of funding generated by their indirect cost rate, (Ex. C, D, E), lacks merit. There is nothing in the ISDA that requires the use of this formula. Nor could it, because it would circumvent the requirement that all funding be subject to the availability of appropriations. See 25 U.S.C. § 450j-1(a). Their second claim, that the funding provisions of the ISDA require that the Secretary adjust their indirect cost rates prior to calculating the funding levels, (2d Am. Compl. ¶¶ 20-25; Ex. C, D, E), also lacks merit. Again, there is nothing in the ISDA that mandates anything close to this level of detail. In fact, Congress was well aware that tribal contractors often have and use indirect cost rates as these rates are referenced in various parts of the ISDA, see, e.g., id. §§ 450b(g), 450j-1(c), 450j-1(d)(1), but critically, indirect cost rates are not mentioned in the funding provisions.⁸

In essence, both of Plaintiffs' arguments are founded upon a belief that the ISDA mandates the payment of a specific, ascertainable amount. According to their argument, this

⁸ It is expected that Plaintiffs will point to Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), as support for their argument that the ISDA requires IHS to adjust or recalculate their indirect cost rates. As a preliminary matter, Congress has clarified any ambiguity that the Tenth Circuit found in the ISDA that permitted it rule for the plaintiffs and thus the decision is no longer good law. See 25 U.S.C. § 450j-2. But more important for purposes of this Motion, the Tenth Circuit did not hold that promises under ISDA contracts could be invalidated if the indirect cost rates used to calculate the indirect costs promised under an ISDA contract were inconsistent with the ISDA.

amount could never be derived by the parties pursuant to a negotiation because, according to Plaintiffs, it is set by statute. Under their theory, the Secretary would even be liable when he agreed to every element of the tribal organization's proposal if the amount awarded was less than the amount the existing (and perhaps significantly outdated) indirect cost rate would generate. This argument lacks any basis in the text or purpose of the ISDA.

In sum, the funding levels and terms in Plaintiffs' annual funding agreements are fully in compliance with the ISDA and its provisions. Although Plaintiffs may be dissatisfied with the funding levels that they negotiated and agreed to, they are bound by those levels. They fail to state a claim that the funding terms of their agreements conflict with the ISDA.

C. The Doctrines of Waiver and Estoppel Preclude Plaintiffs From Challenging the Terms and Amounts in their Agreements.

The Court should dismiss for failure to state a claim Plaintiffs' claims that their agreements are inconsistent with the ISDA. Even assuming, arguendo, that the ISDA required a specific contract amount for indirect CSC, Plaintiffs have waived (and are estopped from raising) any claim to additional funding because they continuously and knowingly acquiesced to the amounts in their agreements. Plaintiffs' knowing and voluntary acceptance is demonstrated by the fact that (1) they failed in each year to challenge the funding levels and funding terms proposed for their agreements pursuant to the procedures available to them under the ISDA, (2) they executed the relevant agreements year after year, (2) they performed under the agreements, and (3) they accepted funding from the Secretary under the agreements. The Secretary, as a party to these agreements, relied upon the enforceability of their terms, and acted to his detriment in assuming other obligations. Under these circumstances, the law of waiver and

estoppel preclude any claims that Plaintiffs might raise for additional funding.

Waiver and estoppel are affirmative defenses, but can be raised and decided on a motion to dismiss for failure to state a claim when the facts necessary to the defense, if any, are found in the complaint. See Smith-Haynie, 155 F.3d at 578. In this instance, the only facts that are pertinent to these affirmative defenses are contained in (1) Plaintiffs' Complaint, (2) Plaintiffs' contracts and indirect cost rate agreements, demonstrating their assent to the terms and conditions therein, and (2) Plaintiffs' CDA claims, which acknowledge that Plaintiffs have accepted large amounts of funding under their contracts over many years without objection. These documents are fairly incorporated into the Complaint, and thus can be considered by the Court in ruling on this Motion to Dismiss. See EEOC, 117 F.3d at 624.

1. Plaintiffs Have Waived Any Possible Claim to Additional Funding Under ISDA.

When a government contractor believes that the government has violated a statute by virtue of the terms or conditions of a government contract, the contractor cannot simply continue contract performance, without protest, without waiving the claim.⁹ See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997) ("The doctrine of waiver precludes a contractor from challenging the validity of a contract . . . where it fails to raise the problem prior to execution, or even prior to litigation."); E. Walters & Co., Inc. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978) (finding that contractor waived claim that contract violated regulation by

⁹ The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret and apply the CDA almost exclusively, see 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein. It is only by virtue of 25 U.S.C. § 450m-1(a) that Plaintiff can bring these CDA claims in this Court or any federal district court, where there exists very little case law on the CDA.

consciously choosing to “fully perform the contract as if there were contemporaneous agreement of the parties on the proper interpretation of the [regulation]”); Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 417 (2003) (finding waiver when, inter alia, the contractor bid “over and over” on solicitations containing the same clauses that it challenged as illegal), rev’d on other grounds sub nom., Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005); Reservation Ranch v. United States, 39 Fed. Cl. 696, 712 (1997) (holding that party to a government contract waived presumed statutory right by agreeing to contract with contrary term), aff’d on other grounds, 217 F.3d 850 (Fed. Cir. Sept. 9, 1999) (unpublished mem.); see also Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (recognizing that the acceptance of contract provisions that are different from those in the Constitution or a statute can demonstrate voluntary and knowing waiver of a constitutional or statutory right); Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 641 (Fed. Cir. 1989) (same).

Courts reviewing claims of waiver of statutory rights have considered whether Congress intended to preclude waiver of any substantive protection. See Do-Well, 870 F.2d at 641. The Do-Well Court explained:

We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain, the party should be held to it unless Congress itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. (citation, internal quotation marks, and alterations omitted). Cf. Cherokee Nation, 125 S. Ct. at 1182 (disfavoring an interpretation of the ISDA that “would undo a binding governmental contractual promise”). The burden to show that Congress intended to preclude waiver is on the party opposing waiver. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S.

Ct. 2332, 2337-38 (1987).

Here, Congressional intent is clear that general principles of waiver apply to ISDA contracting parties. As described above, Congress intended the parties to reduce the general funding provisions of the ISDA to actual contract terms with actual funding levels, and intended that tribes and tribal organizations would negotiate the amount of funding to which they believed they were entitled. See 25 U.S.C. §§ 450j-1(a), 450f(a)(2).

More than that, Congress provided tribes and tribal organizations with a powerful vehicle--the declination action--for immediate federal court review of the Secretary's decision to decline to fund a contract at the level or under the terms proposed by the tribe or tribal organization. See id. §§ 450m-1(a), 450f(a)(2). For example, if the Secretary declines to accept the funding levels or funding terms proposed by a tribal contractor, either for purposes of a new self-determination contract or for purposes of an AFA, § 450f(a)(2) of the ISDA provides that the tribe or tribal organization can challenge the basis for that "declination" through an administrative process, described in 25 C.F.R. § 900.150-900.176, or directly in federal court. See id. § 450f(b); 25 C.F.R. § 900.31. If a tribe or tribal organization chooses to go to federal court, § 450m-1(a) gives federal courts the power to review a Secretary's declination decision for its compliance with ISDA and, if the decision was in error, to enjoin the Secretary to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. § 450m-1(a). Thus, the typical result of a successful declination action challenging the funding levels provided by the Secretary is an order compelling the Secretary to enter into a contract in conformity with the tribe or tribal organization's proposal.

It is difficult to imagine a more comprehensive procedure available to tribes and tribal organizations that wish to negotiate their funding promises. If a tribe or tribal organization is dissatisfied with the Secretary's offer of funding and refuses to accept it, it can either take advantage of an administrative review process or seek review in federal court. See id. § 450f(a)(2). In either proceeding, the Secretary bears the burden of proof, and he must demonstrate that the declination was based on one of five statutory factors. See id. In this respect, the tribe or tribal organization has every incentive to ensure that the terms and conditions of any contract that it signs embody everything to which it believes it is entitled. Once a tribe or tribal organization has a contract that gives it every statutory benefit of which it wished to take advantage, it can then enforce the terms and conditions of the contract under the CDA. See id. § 450m-1(a). If ultimately successful in a CDA action, the tribe or tribal organization is entitled to interest from the date that the claim was presented to one of IHS's contracting officers. See 41 U.S.C. § 611. Tribe and tribal organizations thus have every incentive to ensure that the Secretary's actions conform to their understanding of the ISDA. What ISDA does not contemplate is for a tribe or tribal organization to accept the terms offered by the Secretary, accept the Secretary's performance, and then ask a court to reopen its contract to add additional terms and conditions to which the parties never agreed.

The availability of judicial review of, inter alia, the proposed funding levels and funding terms prior to contract formation coupled with the fact that the ISDA does not prescribe any specific amount of funding, demonstrate that Congress clearly intended the parties to be bound by the terms and conditions of the ultimate agreement itself, including the terms specifying the amount of funding to be awarded by the Secretary.

Moreover, Plaintiffs, like all contractors, have always been in the best position to propose the funding amounts that they need (or to which they believe they are entitled) in order to provide the health care services and programs under contract. By executing the agreements that provided for a particular funding level, Plaintiffs affirmatively signaled an intent to forego any additional benefits that could possibly be read in the ISDA. By seeking relief at this late date and after accepting funding under their agreements, Plaintiffs have “retained all options for [themselves] . . . made [their] calculation entirely in [their] own favor, without proper consideration of the defendant’s position,” and thus violated the “basic principle calling for fair treatment of both parties.” Ling-Temco-Vought, Inc. v. United States, 201 Ct. Cl. 135, 148 (1973).¹⁰

Under these circumstances, contractors like Tunica and Ramah that fail to take advantage of ISDA’s declination review procedure and enter into contracts should be held to the four corners of those contracts. They have agreed to these terms, and they accepted funding under these agreements. The contract should be deemed a waiver of any rights or claims that they might have otherwise had under the ISDA.

¹⁰ There are some older cases where courts have declined, in the face of actual illegality, to apply waiver or estoppel. See, e.g., Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988); MAPCO Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405, 416 (1992), rev’d by implication on other grounds by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005). The Hermes court, in comparing these cases to other cases applying waiver, concluded that the former were decided differently than the latter because, in the former, the government contractor complained that its contract was inconsistent with a statute at contract formation or at an early juncture in the dispute, and the government’s use of the illegal contract outweighed any wrongdoing on the part of the contractor. See 58 Fed. Cl. at 413. In any event, because Plaintiffs declined to take advantage of the declination procedures that would have given them an opportunity to challenge any terms that they believed to be inconsistent with the ISDA and instead accepted funding under their agreements year after year, they cannot escape the application of waiver and estoppel.

2. Plaintiffs Are Estopped from Challenging the Validity of Their Agreements.

That Plaintiffs failed to object and instead accepted funding under their AFAs is made worse by the fact that the Secretary relied to his detriment on the funding levels and funding amounts negotiated by the parties and set forth in the agreements. All pertinent appropriations that might have been available for obligation in Plaintiffs' 1995-2001 agreements (had they challenged the funding levels prior to execution) have lapsed as a matter of law,¹¹ and most have long since been obligated for other purposes. Had Plaintiffs raised their objections prior to contract execution, the Secretary would have had a full range of options: he could have litigated the issue, he could have attempted to re-negotiate the funding levels with the Plaintiffs, or he could have agreed to provide additional funds for Plaintiffs' agreements if appropriated funds were available and not already obligated. Further, had Plaintiffs raised their claims and been

¹¹ Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28, 2536, 2537-38 (1994) (appropriating, after reduction and rescission, \$1,325,461,380 in fiscal year 1995 non-earmarked funds, to be available to IHS for obligation for one year) (Ex. R); Omnibus Consol. Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-196, 1321-380-81 (1996) (appropriating, after a rescission of \$2,533,000, \$1,363,939,000 in fiscal year 1996 non-earmarked funds, to be available to IHS for obligation for one year) (Ex. S); Omnibus Consol. Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-212-13, 3009-220 (1996) (appropriating \$1,418,738,000 in fiscal year 1997 non-earmarked funds, to be available to IHS for obligation for one year) (Ex. T); Dep't of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997) (appropriating an amount not to exceed \$161,202,000 for CSC to be available to IHS for obligation for one year) (Ex. U); Omnibus Consol. & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278-79, 2681-286 (1998) (appropriating an amount not to exceed \$203,781,000 for CSC to be available to IHS for one year) (Ex. V); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181-82, 1501A-190 (1999) (appropriating \$228,781,000 for CSC, to be available to IHS for one year) (Ex. W); Dep't of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 922, 978-79, 987 (2000) (appropriating, after rescission, \$248,233,682 for CSC to be available to IHS for one year) (Ex. X).

successful years ago, the Secretary necessarily would have obligated additional funds for Plaintiffs' agreements and not for other purposes. This would have ensured that the Secretary not exceed the appropriations limitations set by Congress and thus circumvent Congress's exclusive power to appropriate funds. See U.S. Const., art. I, § 9, cl. 7.

Conversely, if the Court permits Plaintiffs to raise their claims now and if they are 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 would now be considered part of Plaintiffs' agreements.¹² Plaintiffs should be estopped from challenging the terms in their agreements at this late date as they had every opportunity—and a statutory procedure—to attempt to obtain more favorable contract terms prior to contract execution.

In a central case explaining estoppel, a government contractor claimed that the government had violated a regulation by exercising a contract option that, in effect, permitted the government to procure the product under contract at an extremely low price. See E. Walters, 576 F.2d at 368. The Court held that the contractor was estopped from raising its claim because it had failed to object at the time of the contract award and instead fully performed the contract, to the government's detriment. See id. As the Court explained it:

Had plaintiff protested the use of the [challenged] provision at the time of award, defendant would have been in a position to either reaffirm its use of the [provision], in apparent disregard of [the regulatory] prohibition, with the further knowledge that it could later be faced with a claim for the [higher] price . . . or it could have elected instead, to [omit the challenged provision but award the contract to the next lowest bidder] Plaintiff's silence deprived the

¹² While monetary relief would presumably come from the Judgment Fund, the CDA requires IHS to repay these amounts. See 41 U.S.C. § 612.

Government of that relatively painless alternative.

Id.; see also Union Pac. R.R. Co. v. United States, 847 F.2d 1567, 1570 (Fed. Cir. 1988) (applying equitable estoppel against government contractor that complied with a contract term because the government cannot be put back in the same position as before the challenge); Hartford Accident & Indem. Co., 130 Cl. Ct. 490, 567 (1955) (finding that contractor was estopped from arguing that contractual terms were invalid because it had knowledge of the terms and accepted payments under the contract).

In summary, Plaintiffs performed under their contracts and funding agreements without objection. They also accepted funding from the Secretary for many years under agreements that they now allege conflict with the ISDA. (Ex. B, C, E.) The doctrines of waiver and estoppel, as well as basic principles of fairness, dictate that Plaintiffs' claims be dismissed.

II. ALL CLAIMS AGAINST SECRETARY NORTON SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR FAILURE TO STATE A CLAIM.

It is not entirely clear from the Second Amended Complaint and Plaintiffs' CDA claims whether they seek this Court's review of the validity of their indirect cost rates independent from the claim that the Court should review the inclusion of their rates in their self-determination contracts (discussed above). Assuming that Plaintiffs do indeed seek such review, such claim, if ultimately successful, would not yield any monetary relief. NBC's sole function related to this lawsuit is to negotiate and approve indirect cost rates; NBC awards no contracts or funding, ISDA or otherwise, that are actionable here. Thus, the most that the Court could order pursuant to such a claim is that NBC recalculate Plaintiffs' out-of-date rates. As such relief would have no practical effect, these claims are moot and the Court should dismiss them outright. See

Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 950 (D.C. Cir. 2005) (dismissing claim as moot where granting relief would not provide plaintiff with any meaningful relief).

In the alternative, the Court should dismiss any claims for review of Plaintiffs' indirect cost rates because some are brought too early and some are brought too late.

A. For the Years In Which Plaintiffs Have Indirect Cost Rates, the Doctrine of Waiver Precludes the Court From Reviewing their Validity.

For the years in which Plaintiffs have indirect cost rates, the Court should dismiss for failure to state a claim all claims seeking review of the validity of these rates. Plaintiffs have waived these claims. Waiver is an affirmative defense that may be raised on a motion to dismiss if the necessary facts are part of the Complaint. See Smith-Haynie, 155 F.3d at 578. Here, Defendants rely solely on the facts in the Complaint and Plaintiffs' indirect cost rate agreements, which are fairly incorporated therein. See EEOC, 117 F.3d at 624. Tunica has indirect cost rates for calendar years 1995 and 1996. (Moberly Decl. ¶ 4.) Ramah has indirect cost rates for calendar years 1995-2003. (Moberly Decl. ¶ 8.) Any attempt by Plaintiffs to challenge the validity of these rates as violating ISDA, however, is barred by the affirmative defense of waiver. See Whittaker, 124 F.3d at 1446; Seaboard Lumber, 903 F.2d at 1563; E. Walters, 576 F.2d at 368; Hermes, 58 Fed. Cl. at 417; Reservation Ranch, 39 Fed. Cl. at 712. Just as they failed to take advantage of the plenary procedures available to them at the ISDA contract formation stage, Plaintiffs failed to utilize the separate dispute resolution process provided by DOI as it relates to the indirect cost rate negotiation.

As explained in OMB A-87, disputes between the cognizant agency and a contractor related to the negotiation of an indirect cost rate should first be raised with the cognizant agency

via the agency's administrative appeals procedure. See 2 C.F.R. Pt. 225, App. E, § F.4.

Plaintiffs' cognizant agency is DOI, whose appeals procedures are found at 43 C.F.R. §§ 4.1 et seq. Plaintiffs failed to take advantage of this procedure, and thus DOI has been deprived of an opportunity to review the validity of Plaintiffs' indirect cost rates in the first instance, in violation of the law requiring that litigants exhaust available administrative remedies before seeking to adjudicate disputes in court. See, e.g., Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004) ("Exhaustion of administrative remedies is generally required before seeking judicial review so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.") (citations and internal quotation marks omitted).

The actions taken by Plaintiffs fully demonstrate their knowing and voluntary waiver of the right to challenge their rates. Instead of taking advantage of the agency's appeals procedure, Plaintiffs agreed, without objection, to each of their indirect cost rates by signing their indirect cost rate agreements. See Tabs A-F to Moberly Decl. But they went even further. They then entered into contracts with IHS agreeing that indirect CSC would be calculated on the basis of their NBC rates, without adjustment or recalculation. (Ex. I at 32; J at 23, 79, 101, 158; Ex. K at 20; Ex. M at 19, § d.1.ii; Ex. O at 22, § d.1.i.) They did this without objection or resort to ISDA's judicial review process, 25 U.S.C. §§ 450f(a)(2), 450m-1(a), in which they could have challenged the use of an indirect cost rate to calculate indirect costs if they believed that doing so violated the ISDA. There can be no conclusion but that they affirmatively waived any claims related to the validity of these rates.

B. For the Years In Which Plaintiffs Do Not Have Indirect Cost Rates, Plaintiffs' Claims Are Not Ripe.

For those years in which Plaintiffs lack rates, (Moberly Decl. ¶¶ 4-6, 8-10), the Court should dismiss for lack of subject matter jurisdiction all claims seeking review of the validity of the rate methodology. These claims are unripe. There is, in fact, no agency action (no rate) for the Court to review. Under these circumstances, Article III dictates that their claims be dismissed on ripeness (and standing) grounds.

Plaintiffs' first legal challenge appears to be that NBC, in violation of the ISDA, requires the inclusion of programs in their direct cost base even when that program does not award the full amount of indirect costs generated by their rate. (2d Am. Compl. ¶ 21.) To ascertain if Plaintiffs even have an injury under this theory, the Court would have to analyze each contractor's actual indirect costs and the programs and amounts in its direct cost base for each year. Then, the Court would have to ascertain, for each year, whether the direct cost base includes programs that fail to pay the indirect costs allocated to them under the rate. Because Plaintiffs do not have rates for certain years, a record related to the underlying facts for these years does not exist.

Plaintiffs' second legal challenge appear to be that NBC fails to properly account for indirect cost under-recoveries in any given year in violation of the ISDA. (2d Am. Compl. ¶¶ 23-25.) To determine if Plaintiffs even have an injury under this theory, the Court again must analyze, for each year, whether Plaintiffs had any under-recoveries that were not accounted for in a new rate. And once again, there is no record upon which the Court may consider these claims because there are cumulatively many years for which Plaintiffs lack rates.

Under these circumstances, Plaintiffs cannot satisfy the constitutional and prudential ripeness requirements. Article III of the Constitution limits the role of federal courts to the resolution of cases and controversies. See U.S. Const. art. III, § 2. Fundamental justiciability doctrines, including ripeness (and standing), are derived from this case-or-controversy requirement. See Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324 (1984); Nat’l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). An Article III court cannot entertain the claims of a litigant unless they satisfy both constitutional and prudential ripeness requirements. See Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999).

A claim is not constitutionally ripe for adjudication unless there is an “injury in fact” that is “certainly impending.” Nat’l Treasury Employees Union, 101 F.3d at 1427. “Allegations of possible future injury do not satisfy the requirements of Art. III.” Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 1724 (1990); see also Nat’l Treasury Employees Union, 101 F.3d at 1427 (ripeness and standing share the constitutional requirement “that an injury in fact be certainly impending”). The ripeness inquiry also dictates that courts “go beyond constitutional minima and take into account prudential concerns which in some cases may mandate dismissal even if there is not a constitutional bar to the exercise of . . . jurisdiction.” Wyo. Outdoor Council, 165 F.3d at 48. Under the prudential inquiry, a court must consider ““the fitness of the issues for judicial decision”” and ““the hardship to the parties of withholding court consideration.”” Id. at 48 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515 (1967)).

“The degree of finality of agency action is the key consideration in evaluating its ‘fitness

for judicial review' under the ripeness doctrine." Transp. Robert (1973) LTEE v. INS, 940 F. Supp. 338, 340 (D.D.C. 1996). Elaborating on the prudential ripeness requirements, the Supreme Court has held that courts must consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670 (1998).

All of these factors support the dismissal of Plaintiffs' rate claims for the years in which they have not obtained indirect cost rates. Judicial intervention at this stage would "inappropriately interfere with further administrative action[,]" Ohio Forestry Ass'n, 523 U.S. at 733, 118 S. Ct. at 1670, and would promote a "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to be unnecessary," Transp. Robert (1973) LTEE, 940 F. Supp. at 340 n.2.

Second, Plaintiffs will not suffer "any immediate and direct injury" as a result of the Court's refusal to entertain their claims at this time. See Lake Pilots Ass'n v. United States Coast Guard, 257 F. Supp. 2d 148, 162 (D.D.C. 2003). To the contrary, Plaintiffs may benefit from making NBC aware of their contentions through the rate negotiation process. NBC may be able to assist Plaintiffs in exploring the different options available to them under OMB A-87, e.g., the use of multiple or special rates. See 2 C.F.R. Pt. 225, App. E, §§ C.3, C.4. By obtaining multiple or special rates, Plaintiffs may be able to avoid any perceived problem with "rate dilution" by segregating the ISDA programs from the non-ISDA programs, and thus eliminating any non-ISDA programs that happen to under-award indirect costs from the rate calculation to be

used for their ISDA programs. They also might want to consider getting a different type of rate, e.g., a provisional/final rate, which does not rely upon the “carry forward” methodology to account for over and under-recoveries. See id. App. E, §§ B.7, B.8. Taking advantage of these available mechanisms might eliminate some or all of the harm from which they allege they have suffered and avoid the need for litigation entirely. Similarly, the technical nature of the rate-making process strongly favors permitting NBC the first opportunity to interpret and apply the challenged methodology in view of Plaintiffs’ claims.

Not only should Plaintiffs be required to re-negotiate and obtain new indirect cost rates before they ask this Court to calculate new rates for them, they must take advantage of the agency’s administrative processes. Exhaustion of administrative remedies is generally required before seeking judicial review “so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.” Wilbur, 355 F.3d at 677 (quoting Oglesby v. United States Dep’t of Army, 920 F.2d 57, 61 (D.C. Cir. 1990)); see also Marine Mammal Conservancy, Inc. v. Dep’t of Agric., 134 F.3d 409, 412 (D.C. Cir. 1998) (“Administrative appeals permit agencies to correct mistakes by ‘inferior’ officers. Judicial review may thereby be entirely avoided.”); Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (explaining that exhaustion discourages the “frequent and deliberate flouting of administrative processes,” allows an agency to “correct its own errors,” and “promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency”).

As explained above, disputes between NBC and Plaintiffs should be raised before DOI’s

Office of Hearings and Appeals, whose appeals procedures are found at 43 C.F.R. §§ 4.1 et seq. Plaintiffs failed to utilize this procedure, and thus DOI has been deprived of an opportunity to review the validity of Plaintiffs' rates in the first instance. At bottom, it is before NBC that the indirect cost rate should be negotiated, not in district court. NBC and Plaintiffs must develop the facts underlying Plaintiffs' annual rates through the normal negotiation process. Once Plaintiffs have attempted to negotiate with NBC, they should avail themselves of DOI's appeals procedure if they believe that further review is warranted. Only then, if necessary, should this Court review the validity of their indirect cost rates.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' breach of contracts claims for failure to present under the Contract Disputes Act. The Court should also dismiss for failure to state a claim Plaintiffs' claims that their annual funding agreements are inconsistent with the ISDA. Finally, the Court should dismiss any claims related to the alleged miscalculation of Plaintiffs' indirect cost rates as those claims are either moot, waived, or unripe.

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