

**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; P. LYNN SCARLETT, Acting Secretary)	
of the United States Department of the Interior,)	
)	
Defendants.)	

DEFENDANTS’ REPLY IN SUPPORT OF (RENEWED) MOTION TO DISMISS

INTRODUCTION

The primary retort in Plaintiffs’ Opposition to Defendants’ Motion to Dismiss is that the Indian Self-Determination and Education Assistance Act (“ISDA”) requires the payment of a sum certain, the right to which can never be waived. It is when attempting to specifically identify this sum certain, however, that Plaintiffs start to stumble. They urge that the statute mandates the payment by the Secretary of “full” contract support costs (“CSC”) and “all indirect costs associated with ISDA contracts,” (Pls.’ Opp. at 15-17, 25), but do not, and cannot, provide any guidance on what this amount is. Plaintiffs deny that their entitlement to CSC is limited to the terms of the contracts that they have negotiated with the Indian Health Service (“IHS”). In contrast, Defendants have pointed to the specific statutory provisions and the case law that make any claims for additional indirect contract support costs funding arise not under the ISDA, but

under specific ISDA contracts. See Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (Fed. Cir. 2005). The ISDA allows a tribe or tribal organization to a contract or compact with the Secretary with certain terms and under certain circumstances, but any right to payment arises from the terms of the negotiated contracts. Were funding directly recoverable under the statute, there would be no need for an ISDA contract at all.

As Defendants explained in their Motion, the ISDA was carefully crafted to give tribes and tribal organizations control over the contract formation process. The tribal contractor may decide whether and for which programs to contract and it may develop specific programs and services that it believes will best serve its constituents. The tribal contractor may propose funding levels for the contract. And if the Secretary of the Department of Health and Human Services (hereinafter “Secretary”) declines the contractor’s proposal, Congress gave the tribal contractor the ultimate legal weapon: it can get immediate judicial review in federal court of the Secretary’s decision. Once the tribal contractor accepts the funding levels in the contract and the contract is executed, it still may (1) ensure that the Secretary provides these amounts or sue for breach of contract, (2) insist upon desired terms in future annual funding agreement negotiations and if terms are refused, seek judicial review of the Secretary’s declination of the agreement, (3) suspend performance of the contract after notice to the Secretary if funding is not available, or (4) give the programs back to IHS. The procedural protections in the ISDA are clearly in place for the benefit of the tribes and tribal organizations to determine for themselves what is best for their constituents. What the ISDA does not provide is for the retroactive reopening of the contracts to allow for the inclusion of additional funding under any theory presented in this case.

Defendants also demonstrated in their Motion that even if the ISDA could be read to

entitle a contractor to a sum certain, Plaintiffs waived any claim to that specific sum years ago. Under the circumstances presented here, Plaintiffs' execution of their contracts and acceptance of the funding levels specified therein demonstrates a knowing intent to waive any claims for funding above and beyond the funding terms provided for in their contracts. And because the Secretary has expended all relevant IHS appropriations for years 1995-2001 long ago and thus has acted in his detriment in reliance on Plaintiffs' seeming acceptance of the terms of their contracts, Plaintiffs are also estopped from seeking additional funding. Finally, Plaintiffs offer no reasonable argument to justify excusing them from both the mandatory presentment requirements of the Contract Disputes Act ("CDA") for their breach of contract claims and the administrative exhaustion requirement under Office of Management and Budget Circular A-87 ("OMB A-87") for their claims related to the indirect cost rate methodology.

Instead, Plaintiffs' Opposition refers to the trust relationship between the United States and Indian peoples in the hopes of precluding application of accepted contract law principles to this case. Although Defendants do not dispute the fact of a general trust relationship, there is no specific trust relationship between the Secretary and these two contractors in the execution of ISDA contracts. ISDA contracts are to be treated like procurement contracts. See Cherokee Nation v. Leavitt, 543 U.S. 631, 643-44, 125 S. Ct. 1172, 1178 (2005). As such, both parties are held to their promises but have available to them any and all contractual defenses. Plaintiffs have heightened protection under the ISDA, in that if they believe, pre-execution, that the terms of any proposed agreements are contrary to the ISDA, they can trigger a declination by the Secretary which is then subject to judicial review.

Finally, Plaintiffs fail to rebut any of the jurisdictional arguments applicable to the claims

brought against the Secretary of the Department of the Interior. For all of these reasons, Defendants' Motion should be granted, and the Second Amended Complaint dismissed.

ARGUMENT

I. PLAINTIFFS' BREACH CLAIMS HAVE NOT BEEN PROPERLY PRESENTED.

Defendants explained in the Motion that Plaintiffs did not present any claims for breach of contract in their Contract Disputes Act ("CDA") claims. (Defs.' Mem. at 21.) Plaintiffs do not dispute this fact, but merely state that "all contract remedies may therefore be used to challenge a breach of the statute as well as the contract." (Pls.' Opp. at 25.) Because Plaintiffs have not, and cannot, demonstrate proper presentment of their breach claims as is required by the CDA, the Court should dismiss these claims for lack of subject matter jurisdiction. See 41 U.S.C. § 605(a); Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991) (distinguishing between claim for breach of contract and claim for equitable adjustment of contract for purposes of CDA presentment); SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990) (limiting court's jurisdiction to review only claims that have been properly presented); J. Cooper & Assoc. v. United States, 47 Fed. Cl. 280, 285 (2000) (distinguishing between claim for breach of contract and claim for equitable adjustment of contract for purposes of CDA presentment). The only CDA claims over which the Court has jurisdiction are Plaintiffs' claims that more funds should have been added to their contracts.

II. THE ISDA DOES NOT SPECIFY A SUM CERTAIN FOR DETERMINING INDIRECT COSTS.

Regardless of whether Plaintiffs argue that (1) there is a direct statutory entitlement to a certain amount of indirect CSC or (2) an indirect statutory entitlement because the statute is

incorporated into the contract, the actual amount of funding to be awarded by IHS is not set by the statute; it is set through a negotiation between the parties. There is simply no abstract statutory right to (1) all costs desired by the ISDA contractor, (2) all costs incurred by the ISDA contractor, or (3) all costs derived from application of the ISDA contractor's indirect cost rate to IHS program funds. The only entitlement, as the Supreme Court has held, is that a party to a self-determination contract is entitled to rely on the terms and conditions therein. See Cherokee Nation, 543 U.S. at 643-45, 125 S. Ct. at 1181.

Contrary to Plaintiffs' claim that the ISDA entitles a contractor to a sum certain, the ISDA directs that the parties work together to "determine" the amount of funds to be included in an annual funding agreement. See 25 U.S.C. §§ 450f(a)(2), 450j-1(a)(3)(B), 450j-1(b), 450j(c); 25 C.F.R. §§ 900.12, 900.8(h). If the contractor does not agree with the amount that the Secretary provides for indirect CSC, immediate relief is available in federal court. See 25 U.S.C. § 450f(a)(2); Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306, 1310-12 (D. Or. 1997). If the contractor does not avail itself to this relief and instead acquiesces to the amount of funding proposed by IHS, the contractor is bound by the negotiated amount in the executed contract. After execution, tribal contractors can sue the Secretary for breach of contract and, if successful, obtain interest on their claim, see 25 U.S.C. § 450m-1(a); 41 U.S.C. § 611, or they can suspend or retrocede the program for lack of funding, see 25 U.S.C. §§ 450l(c)(b)(5), 450j(e). In future annual funding agreement negotiations, the contractor may again propose desired terms and if they are rejected by IHS, the contractor can force a declination and obtain review in federal court.

In an attempt to avoid this plain interpretation, Plaintiffs first point to various statements made by Members of Congress about how IHS should pay CSC. (Pls.' Opp. at 16-17.) None of

these statements do anything to rebut the plain and ordinary meaning of the ISDA as described above. Plaintiffs next urge that the ISDA's use of the terms "reasonable" and "allowable" are not general terms but references to OMB A-87's definitions of indirect costs. (Pls.' Opp. at 17 & n.9.) Defendants agree that Congress had OMB A-87 in mind when including indirect costs in the ISDA, but simply referring to OMB A-87's definitions gets Plaintiffs no closer to a sum certain. In fact, OMB A-87 makes clear that the amount of funding under any particular contract or grant is determined by the governing statute and funding agreement. See 2 C.F.R. Pt. 225, App. A § A.1. Moreover, by urging that the ISDA references or incorporates OMB A-87, Plaintiffs contradict their own argument that the Circular violates the ISDA.

Defendants' point is not that these terms cannot be interpreted, just that they do not provide an entitlement to a specific amount of funding. Instead, any claim for funding is limited to the funding provisions agreed upon in the contract itself. The specific amount must be determined via a negotiation between the contractor and the Secretary. The contractor must provide a proposal of the amount of costs that it believes to be reasonable and allowable, and the Secretary must agree with this assessment and then ascertain to what degree appropriations are available for this purpose. Together, the parties will attempt to determine an amount for indirect CSC, but if the tribal contractor is dissatisfied with IHS's proposed amount, it can insist on its own figure and force a declination by IHS, of which it can seek review in federal court.

At bottom, Plaintiffs urge that the ISDA creates an entitlement to whatever amount of funding they themselves deem reasonable and allowable. This is an untenable reading of the statute. And no court has so held; in fact, to the contrary, the Federal Circuit has specifically held that there is no entitlement to funding directly under the ISDA. See Samish, 419 F.3d at

1367. It is the contracts themselves that create any entitlement to CSC, the scope of which is determined under traditional contract principles. See id.; Cherokee Nation, 543 U.S. at 643-44, 125 S. Ct. at 1181.

In the ISDA, Congress gave tribal contractors every procedural advantage during the contract formation stage in order to foster self-determination. The generous procedural protections designed for tribal contractors in the ISDA clearly distinguishes ISDA contracts from “contracts of adhesion.” But when a contractor accepts the terms and conditions that it negotiates with the Secretary, the ISDA does not provide an additional entitlement aside and apart from those contract terms.¹

III. DEFENDANTS PROPERLY RAISED WAIVER AND ESTOPPEL IN THEIR (RENEWED) MOTION TO DISMISS.

None of the arguments made by Plaintiffs for why waiver and estoppel are inapplicable

¹ Plaintiffs’ breach claims are virtually identical to their claims for more funding under the statute. Plaintiffs argue that, by incorporating the statute into the contract, the Secretary promised “full payment of contract support costs.” (Pls.’ Opp. at 25.) They thus argue that there is a conflict between the general contract term providing for full payment and the specific contract term setting the amount. (Pls.’ Opp. at 26.) Defendants do not dispute that some ISDA contracts incorporate the ISDA. But as explained above and in Defendants’ Motion, the ISDA does not mandate the payment of a specific amount of funds, whether independently or as incorporated into a contract. There is thus no reason to construe an ISDA contract as containing a conflict between the statute and the specific funding terms. But even if the Court did believe there was a conflict, it would be easily resolved by reference to the law of contracts that directs that a specific provision of a contract governs over a general one. See Hometown Fin. Inc. v. United States, 409 F.3d 1360, 1369 (Fed. Cir. 2005); Conoco Inc. v. NLRB, 91 F.3d 1523, 1527 (D.C. Cir. 1996); see also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 348, 118 S. Ct. 789, 800-01 (1998) (applying same principle to statutes). See generally United Int’l Investigative Servs. v. United States, 109 F.3d 734, 738 (Fed. Cir. 1997) (holding that contractor’s interpretation of a contract that renders two terms in conflict must be resolved before execution if the conflict is patent). While ISDA contracts are to be construed liberally for the benefit of the contractor, see 25 U.S.C. 450l(c), contract construction would be turned upside-down if doing so rendered the contract’s specific funding provision invalid in favor of general and indeterminate language.

have merit. 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 its claim. See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997); E. Walters & Co. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990); Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 641 (Fed. Cir. 1989); Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 417 (2003), 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), aff'd on other grounds, No. 98-5158, 1999 WL 701887 (Fed. Cir. Sept. 9, 1999) (unpublished mem.). In this instance, Plaintiffs have signed numerous funding agreements without once utilizing the pre-execution, judicial review procedure to challenge the Secretary's CSC funding offers under the law. They have thus waived any and all claims for additional funding based on the Secretary's alleged non-compliance with the law.

A. Plaintiffs Fail to Rebut the Fact that They Waived Any Alleged Right to Additional Funding and Are Estopped From Demanding More Money Now.

Even assuming, for purposes of argument, that the ISDA entitled contractors to be paid a sum certain, this "right" can be waived as long as Congress has not precluded the waiver in the governing statute. See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 705, 65 S. Ct. 895, 900-01 (1945); Do-Well, 870 F.2d at 641. In the ISDA, Congress did not preclude the waiver of judicial remedies by tribal contractors; in fact, Congress fully endorsed the possibility of waiver by allowing contractors access to a federal court before execution of an ISDA contract, but providing in the alternative for acceptance by the contractor of the contract terms.

Plaintiffs do not dispute that waiver is the “intentional relinquishment or abandonment of a known right or privilege.” Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938); Hermes, 58 Fed. Cl. at 411. Plaintiffs argue instead that they did not intentionally waive a known right because they did not know even they had a right or privilege under the ISDA. (Pls.’ Opp. at 25-35.) This contention can be easily dismissed.

1. Plaintiffs’ Conduct Demonstrated An Intent to Waive Claims for Additional Funding.

There is little better evidence of an intent to waive a statutory or regulatory right than (a) not taking advantage of pre-execution remedies, (b) signing a contract, (c) performing the contract, and (d) accepting funds under the contract. See Seaboard Lumber, 903 F.2d at 1563-64 (accepting contract terms that are contrary to constitutional entitlement is voluntary and knowing waiver of constitutional entitlement); Aleutian Constructors v. United States, 24 Cl. Ct. 372, 384 (1991) (“Continuance of the contract is the most common and clearest case of waiver.”); Appeal of USD Techs., Inc., ASBCA No. 31305, 1987 WL 40766 (Mar. 12, 1987), aff’d without opinion, (Fed. Cir. Feb. 3, 1988) (“In the realm of Government contracts, absent mistake or duress . . . few things signify knowing and intentional conduct more than does the execution of a bilateral modification.”); see also Whittaker, 124 F.3d at 1446 (“The doctrine of waiver precludes a contractor from challenging the validity of a contract, whether under a [regulation] or on any other basis, where it fails to raise the problem prior to execution, or even prior to litigation, on which it later bases its challenge.”); PCL Const. Servs., Inc. v. United States, 41 Fed. Cl. 242, 252 (1998) (When the alleged deviation from law is plain on the face of the contract, a contractor’s failure to object before execution of the contract waives the objection), aff’d on

other grounds, No. 03-5060, 2004 WL 842984 (Fed. Cir. Apr. 7, 2004).

In response, Plaintiffs argue that the Secretary has been well aware of their claim. (Pls.' Opp. at 30-31.) Whether the Secretary was aware of generalized complaints by various tribal contractors about the amount of funding appropriated by Congress for CSC is not relevant to waiver. Plaintiffs' recourse at all times was to bring a declination action as described above at the contract formation stage.² Other tribal contractors have availed themselves of this remedy, thus properly notifying the Secretary of a specific grievance. See, e.g., Shoshone-Bannock, 988 F. Supp. at 1310-12. By foregoing this remedy, Plaintiffs evinced an intent to perform under the terms and conditions of their contracts.³ The decision not to take advantage of the pre-execution judicial remedy available and instead accepting the terms and conditions of the contracts demonstrate an intent to waive claims to additional funding under the ISDA.

² Plaintiffs argue that they could not challenge the amount of funding or their indirect cost rates any earlier because the Secretary did not issue a declination. (Pls.' Opp. at 36.) This is exactly Defendants' point. The Secretary only issues a declination when there is a dispute as to one of the terms in the contract. See 25 U.S.C. § 450f. Here, there was no dispute: Both parties signed the contracts knowing full well what the amount of funding under Plaintiffs' proposed contract would be and that it would be based on indirect cost rates from the Department of the Interior's Office of the Inspector General. The Secretary did not issue a declination because Plaintiffs accepted the amount of funding set forth in their contracts. Tunica and RNSB waived any claims for both additional funding and for any adjustment to their indirect cost rates by not insisting on another amount before execution of the contract and forcing the Secretary to issue a declination that would be reviewed by a court before any agreement was signed.

³ Plaintiffs also point to IHS's attempts to obtain more appropriations from Congress over the years for ISDA contractors as evidence that their claims were not intentionally waived. (Pls.' Opp. at 30.) These laudable attempts by IHS have no relevance whatsoever to the issue of whether Plaintiffs "intentionally relinquished a known right."

2. Plaintiffs Had Actual and Constructive Knowledge of All “Rights” Flowing From the Law.

Plaintiffs next urge that they did not know that the “rate-making system was illegal.” (Pls.’ Opp. at 32-33.) It is difficult to accept this argument on its face, as Plaintiffs were part of the class of contractors who brought similar claims against the Bureau of Indian Affairs in 1990, with the assistance of Michael Gross, Esq., the same attorney assisting Plaintiffs here. See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (“RNC”). In addition, the School Board has more than once presented its understanding of the ISDA’s funding provisions in federal court. See Ramah Navajo Sch. Bd. v. Shalala, No. 94-914 (D.N.M.) (seeking CSC) (attached as Defs.’ Ex. G to Defs.’ (Initial) Mot. to Dismiss, docketed as #17); Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) (challenging allocation of CSC). But even assuming that Plaintiffs actually were not familiar with the terms of the ISDA and the terms of their contracts, they are imputed with that knowledge. See Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85, 68 S. Ct. 1, 3 (1947) (“[E]veryone is charged with knowledge of the United States Statutes at Large”); Hartford Accident & Indem. Co. v. United States, 127 F. Supp. 565, 567 (Cl. Ct. 1955) (parties to a contract are charged with knowledge of its terms).

They next argue that the Tenth Circuit did not rule in RNC until 1997, which prevented them from bringing their claims. But judicial pronouncements simply explain the operative effect of the law and do not create it. See Jones v. United States, 6 Cl. Ct. 531, 533 (1984); Ide v. United States, 25 Ct. Cl. 401, 1800 WL 1849, at *5 (1890), aff’d, 150 U.S. 517, 14 S. Ct. 188 (1983). Indeed, one is presumed to have some basis for filing one’s claim before filing suit, and Plaintiffs’ argument here would suggest that the plaintiff in the Tenth Circuit had no such basis.

There was nothing that prevented Plaintiffs from litigating the issues raised in this lawsuit before they executed the contracts at issue in this case. In such circumstances, Plaintiffs' decisions not to raise their claims for additional funding under the ISDA before signing the contracts and instead accepting the terms and conditions of the contract amply demonstrate the waiver of a known right. Allowing Plaintiffs here to seek more funding under their contracts by raising arguments that have been available to them since before they executed the contracts at issue would give Plaintiffs the "equivalent of 007's license to kill." Hermes, 58 Fed. Cl. at 412 (quoting earlier court decision in Hermes Consol., Inc. v. United States, 58 Fed. Cl. 3, 19 (2003)). In essence, Plaintiffs would be permitted to agree to the terms of a contract, plan to argue at some later time that the contract did not comply with a statute, accept government funds for years, perform under the contract, and then come back to the government years later and attempt to get an additional funding. Allowing contractors to do this would lead to extreme instability in federal contracting and federal appropriations and would create a disincentive for contractors to make their claims known.

The instances where courts have declined to apply waiver and estoppel, cited by Plaintiffs, (Opp. at 31), are few and are distinguishable, either because the contractor carefully protected his or her rights before the contract was executed or shortly thereafter or because there was egregious behavior on the part of the government. See Hermes, 58 Fed. Cl. at 409, 412-13 (explaining that waiver was not applied in Beta Sys. Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988), Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (1970), and MAPCO Alaska Petroleum Inc. v. United States, 27 Fed. Cl. 405, 416 (1992), overruled on other grounds by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005), because the contractors

in those cases actually complained about the alleged invalidity of the contracts at the contract formation, or, at the very least, at any early stage in the history of the conflict).⁴

The Hermes court also distinguished between those cases where the contract was “illegal” or “contrary to public policy” as opposed to “unauthorized” under the law. See 58 Fed. Cl. at 419. The Hermes court characterized the plaintiff’s claim that a clause of their contract violated a federal regulation as “unauthorized” and not rising to the level of “illegal.” See id. A contract, like that here, which provides for less funding than a statute might allow is not an “illegal” contract; even assuming that there was additional funding to be had under the statute, contractors are always free to decline to accept additional funding. Thus, a contract term agreeing to the same thing is not illegal nor is it against public policy.

Moreover, recent cases in the Court of Federal Claims (the primary court for resolution of government contract disputes) have continued to apply waiver when the government contractor voluntarily entered into the contract that it later claimed violated a statute or a regulation. See Mexican Intermodal Equip., S.A. de C.V. v. United States, 61 Fed. Cl. 55, 70 (2004) (“[The plaintiff] belatedly seeks the benefit of a bargain it did not make, which, if permitted by this

⁴ In an extremely disingenuous attempt to preclude the application of waiver, Plaintiffs claim that IHS should have reopened Plaintiffs’ “agreement[s]” after the Tenth Circuit decision in RNC. (Pls.’ Opp. at 31-32.) Plaintiffs’ citation to 2 C.F.R. Pt. 225, App. E, § E.3, however, refers not to the ISDA agreements entered into between Plaintiffs and the Secretary but to indirect cost rate agreements negotiated between Plaintiffs and the Department of the Interior’s Office of Inspector General. As Plaintiffs well know, IHS does not negotiate indirect cost rates and cannot adjust a contractor’s indirect cost rate. (Pls.’ Opp. at 41.) The RNC plaintiffs also made clear that the RNC decision was not to apply to IHS contracts by carving out claims against IHS in a partial settlement agreement. (Ex. 10 to Pls.’ Mot. for Partial Summ. Judg., docketed as #81.) Finally, Congress passed a statute in 1998 that barred the Secretary from paying costs not directly attributable to IHS programs, see 25 U.S.C. § 450j-2, thus clarifying the ambiguity identified by the Tenth Circuit in RNC.

court, would tend to undermine the fairness of the procurement process. . . . [Instead], Plaintiff should be held to its voluntary contract commitment.”) (citation and internal quotation marks omitted); Flink/Vulcan v. United States, 63 Fed. Cl. 292, 307-08 (2004) (reiterating the long accepted doctrines of waiver and estoppel), aff’d on other grounds, No. 05-5048, 2006 WL 222995 (Fed. Cir. Jan. 12, 2006).

The administrative decision, Appeals of Seldovia Village Tribe, IBCA Nos. 3862, 3863/97, 2003 WL 2003 WL 22422891 (Oct. 20, 2003), cited by Plaintiffs for the proposition that waiver should not apply is neither authoritative nor binding here. Seldovia was decided before Cherokee, the case in which the Supreme Court indicated that ISDA contracts should not be accorded special treatment but should be treated like ordinary government contracts. Second, the decision in Seldovia is not persuasive because the administrative judge but did not discuss authoritative Federal Circuit decisions such as Whittaker and E. Walters & Co. Instead, the judge cited to MAPCO, a 1992 decision of the Court of Federal Claims which has since been called into doubt by another judge of that Court. See Hermes, 58 Fed. Cl. at 412 (explaining that it was troubled by the court’s waiver decision in MAPCO as inconsistent with Federal Circuit precedent). The judge also cited to another case that involved a contract provision that was contrary to law and also allowed the government to benefit. In this case, the government has not benefitted from the contract term that allegedly violates the ISDA. In fact, if this exception were to apply to this case, it would apply to every case in which a government contractor disputed the amount of funding provided for in a contract based on a statute or regulation. Waiver would never apply.

Plaintiffs have likewise not rebutted the application of estoppel. Defendants explained

that 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, and most have long since been obligated for other purposes. (Defs.' Mem. at 34.) In response, Plaintiffs state merely that the Judgment Fund may be used to recover any damages. (Pls.' Opp. at 31-32.) But the Judgment Fund specifically requires that funds awarded under the CDA be reimbursed by the agency that incurred the judgment. See 41 U.S.C. § 612(c). Therefore, if IHS incurs a judgment here and thus is required to repay the Judgment Fund, IHS's other programs, all of which are for the benefit of tribes, will be harmed. The declination process ensures that if a contractor is not satisfied with the funding levels offered by the Secretary, the dispute will be resolved before any promises are made and generally before all relevant appropriations are exhausted. Once contracts are executed, the Secretary has every reason to rely on their terms and not to expect that additional funds would be required. Estoppel applies to bar Plaintiffs' claims.

B. This Court Can Consider Waiver and Estoppel Notwithstanding the Fact that the Contracting Officer Did Not Raise These Affirmative Defenses in the Decision.

Plaintiffs assert that Defendants cannot argue waiver and estoppel here because these defenses were not raised in the contracting officers' decisions. (Pls.' Opp. at 13-14.) Government contracting-plaintiffs cannot raise claims not presented to a government contracting officer and government agency-defendants cannot raise claims that were not the subject of a contracting officer decision. The CDA is quite strict in this respect. See 41 U.S.C. § 605(a); Reliance, 931 F.2d at 866; SMS Data Prods., 19 Cl. Ct. at 615; see also Tunica Am. Mem. Opin. at 10-15 (docketed as #48). A claim is analyzed by reference to its operative facts, and when a

claim (or defense) involves a separate set of operative facts not presented to or the subject of a contracting officer's decision, the reviewing federal court lacks jurisdiction. See Foley Co. v. United States, 26 Cl. Ct. 936, 940 (1992); Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 417 (1987); Tecom, Inc. v. United States, 732 F.2d 935, 936-37 (Fed. Cir. 1984); see also Tunica Am. Mem. Opin. at 10-15.

The affirmative defenses of waiver and estoppel, however, do not involve any facts beyond the undisputed fact of the existence of contracts under which Plaintiffs accepted government funds. (2d Am. Compl. ¶¶ 1-5.) Moreover, Foley, the case cited by Plaintiffs, did not endorse the view that no new defenses could be raised in federal court. See 26 Cl. Ct. at 940. It stated that where, as with the facts presented, the new defenses had to be supported with new facts (i.e., proof of quantity overruns and unforeseeability), the defenses sounded more like counterclaims and had to be the subject of a contracting officer's decision before being adjudicated in federal court. See id. Waiver and estoppel are entirely unlike the defenses discussed in Foley, because these defenses are primarily legal and arise out of facts not disputed. Foley provides no assistance to Plaintiffs here.

C. There is No Bar in Federal Rule of Civil Procedure 12(g) to the Court's Consideration of Waiver and Estoppel.

Plaintiffs next argue that Federal Rule of Civil Procedure 12(g) bars the Court's consideration of waiver and estoppel because they were not raised in Defendants' Initial Motion to Dismiss filed in this case on March 31, 2003. (Pls.' Opp. at 14-15.) They are wrong for several reasons. First, Defendants' (Renewed) Motion to Dismiss raised waiver and estoppel under Rule 12(b)(6). (Defs.' Mem. at 28.) The defense of failure to state a claim can be raised

under Rules 12(b)(6), 12(c), 56(c), at a trial on the merits, or in the party's responsive pleading. See Fed. R. Civ. P. 12(g), (h). It cannot be waived. See Wyatt v. Syrian Arab Republic 398 F. Supp. 2d 131, 142 n.7 (D.D.C. 2005) (citing Gordon v. Nat'l. Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982), and Daingerfield Island Protective Soc'y v. Lujan, 797 F. Supp. 25, 29 (D.D.C.1992)). This is in contrast to the defenses raised in the cases cited by Plaintiffs, involving improper venue, see Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-11 (5th Cir. 1993), and lack of personal jurisdiction, see Seretse-Khama v. Ashcroft, 215 F. Supp. 2d 37, 39-40 (D.D.C. 2002), defenses which fall within Rule 12(g). A motion to dismiss for failure to state a claim does not. See Rule 12(g), (h)(2).

In this case, the Court granted in part and denied in part Defendants' initial motion to dismiss pending jurisdictional discovery. Before the Court resolved the remainder of the motion, the case was stayed pending Cherokee, as it was expected that Cherokee would provide critical guidance about the nature of ISDA contracts. Once Cherokee was decided, the claims in the Complaint had to be read in a new light and Defendants' original defenses needed to be modified. The Court permitted Defendants to make this entirely proper modification in a renewed motion to dismiss.

D. The Secretary is Not a Trustee For Purposes of ISDA Funding.

Plaintiffs' Opposition is riddled with references to a "trust relationship" between the Secretary and Plaintiffs. (Pls.' Opp. at 1, 7-8, 29.) Without citing a single case, Plaintiffs then use their incorrect assertion of an enforceable trust to argue that a trustee cannot raise equitable defenses against the beneficiary. (Pls.' Opp. at 34.)

There is a general trust relationship between the Indian people and the United States, see

United States v. Navajo Nation, 537 U.S. 488, 506, 123 S. Ct. 1079, 1091 (2003), reaffirmed in the ISDA itself, see 25 U.S.C. § 4501(c)(d)(1)(A). But this relationship is not actionable in and of itself, and the reaffirmation of this general duty in a statute does not itself transform Plaintiffs' role under the ISDA from one of government contractor to one of beneficiary or the Secretary's role as disbursing of federal funds for ISDA contracts to one of trustee. See Samish, 419 F.3d at 1367; see also Reuben Quick Bear v. Leupp, 210 U.S. 50, 77, 28 S. Ct. 690, 694-95 (1908) (distinguishing public funds from trust or tribal money and stating that the former "relates to public moneys belonging to the government" and the latter "belong to the Indians"). For an enforceable trust relationship, the government must control property belonging to Indians. See United States v. White Mountain Apache Tribe, 537 U.S. 465, 473-74, 123 S. Ct. 1126, 1133 (2003); United States v. Mitchell, 463 U.S. 206, 225-28, 103 S. Ct. 2961, 2972-74 (1983); Cobell v. Norton, 240 F.3d 1081, 1098-99 (D.C. Cir. 2001).

Similar to the Indian Mineral Leasing Act ("IMLA"), which in Navajo Nation the Supreme Court held did not mandate the payment of money such that a claim for damages could be brought directly under the statute, the ISDA does not "give the Federal Government full responsibility to manage Indian resources . . . for the benefit of the Indians." 537 U.S. at 507, 123 S. Ct. at 1092 (citation and internal quotation marks omitted). On the contrary, like the IMLA, the ISDA "aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role" in providing services and benefits to tribes and their members. Id. at 508, 123 S. Ct. at 1092. Also like the IMLA, the ISDA does not give the Secretary managerial control over the programs covered by self-determination contracts, but rather transfers that control to the tribal contractors. See id. Since the ISDA is parallel to the IMLA in these

significant respects, the Supreme Court's decision in Navajo Nation is controlling.

In reviewing the ISDA, the Supreme Court has specifically stated that ISDA contractors should be treated like other government contractors. See Cherokee Nation, 543 U.S. at 638, 125 S. Ct. at 1178 (nothing in the statute indicates that ISDA contracts are entitled to special treatment or treated in any way other than as procurement contracts); 543 U.S. at 643-44, 125 S. Ct. at 1181 (holding that ISDA contracts are subject to ordinary contract interpretation and should not be accorded “special interpretation”). The ISDA does not authorize the Secretary of HHS to assume control over Plaintiffs’ property or manage Plaintiffs’ property in any way. Instead, the ISDA directs the Secretary to distribute federal taxpayer funds for the purpose of paying indirect CSC incurred by self-determination contracts. Because the ISDA did not create a trust relationship with fiduciary duties, the Secretary of HHS is not barred from raising equitable defenses in response to contractors’ claims for additional CSC funding.

IV. COLLATERAL ESTOPPEL DOES NOT BAR DEFENDANTS’ MOTION.

Plaintiffs attempt to invoke collateral estoppel based on Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1463 (10th Cir. 1997) (“RNC”) as a bar to Defendants’ Motion and argue that Defendants are precluded from (what they claim to be) relitigation of the validity of the indirect cost rate methodology in OMB Circular A-87. (Pls.’ Opp. at 20-24.) Defendants’ Motion to Dismiss, however, does not address the merits of Plaintiffs’ challenge to their indirect cost rates. Defendants raise threshold legal arguments about whether the ISDA intended to allow contractors to negotiate and specify in their contracts a set amount of indirect costs, only later to come back to the government for more funding. The issue is separate and apart from that

presented and decided in RNC.⁵

V. PLAINTIFFS FAIL TO REBUT DEFENDANTS' JURISDICTIONAL ARGUMENTS PRECLUDING ANY RELIEF RELATED TO THEIR INDIRECT COST RATES.

Plaintiffs argue that they did not need to challenge the validity of their indirect cost rates through the Department of the Interior's administrative appeal process (2 C.F.R. Pt. 225, App. E, § F.4; 43 C.F.R. §§ 4.1 et seq.), because they presented their CDA claims to IHS. (Pls.' Opp. at 35.) As admitted by Plaintiffs (Pls.' Opp. at 41), and as stated in IHS's responses to Plaintiffs' CDA claims, (Defs.' Ex. D. at 8; Defs.' Ex. F at 6-7, attached to Defs.' (Initial) Mot. to Dismiss, docketed as #17), IHS does not have any authority to adjust indirect cost rates; the task of negotiating indirect cost rates falls on the Department of the Interior's National Business Center ("NBC"). Therefore, to the extent that Plaintiffs are challenging their rates and not just the amount of CSC that they received, they are obligated to exhaust their dispute through the Interior's administrative appeals process.

Plaintiffs also make a weak attempt to argue they would not be able to secure the relief they seek from Interior and thus exhaustion would be futile. (Pls.' Opp. at 43.) In support, they make conclusory assertions such as "[m]ultiple rates are too unwieldy and complicated for most small (or even large) contractors to use," (Pls.' Opp. at 43), a fact contradicted by one of their

⁵ Plaintiffs also appear to imply that because the Department of the Interior did not argue waiver and estoppel in RNC, collateral estoppel bars the Department of Health and Human Services from arguing it here. (Pls.' Opp. at 36-37.) This suggestion is meritless. Collateral estoppel bars relitigation of only those issues raised in the first case that were "actually litigated, contested by the parties and submitted for determination by the court." Jack Faucett Assoc. v. Am. Tel & Tel. Co., 744 F.2d 118, 125 (D.C. Cir. 1984). Since Plaintiffs readily admit that waiver and estoppel were not litigated in that case, there is no bar here. There are also numerous other reasons why collateral estoppel does not apply in any respect to this case, addressed in full in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment.

own witness's stated ability to negotiate multiple rates for the Alamo Navajo School Board.⁶ They also proclaim that contractors do not want to use one of the alternative rate mechanisms (provisional/final rates) discussed in Defendants' Motion because these rates "force the contractor to pay back monies already spent if they are found to be owed the Government at the end of the fiscal year." (Pls.' Opp. at 43.) Not only is this problematic because it suggests that contractors do not wish to refund to the government funds that they rightly owe (the ISDA is not a profit-making statute), it is inaccurate to suggest that tribal contractors do not use these types of rates. They do.⁷ Moreover, there is no dispute that the use of provisional/final rates, which do not utilize a carry-forward computation, would entirely moot Plaintiffs' challenges to the carry-forward computation. Plaintiffs cannot refuse to take advantage of the many alternative and flexible methodologies available under the OMB Circulars--methodologies that would likely address Plaintiffs' concerns--and instead ask the Court to hold an entire federal regulatory scheme invalid. Because Plaintiffs failed to take advantage of the administrative process provided for in OMB A-87, their claims challenging their indirect cost rates should be dismissed. See Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004). Plaintiffs have not come close to satisfying their burden to show that exhaustion would be futile. See Honig v. Doe, 484 U.S. 305,

⁶ Marcel Kerkmans has submitted two declarations in this case in support of Plaintiffs' requested relief. He also submitted a declaration in RNC that states that he assisted the Alamo Navajo School Board in using multiple rates and that the use of multiple rates has allowed the Alamo Navajo School Board to recover almost 100% of the amount of funding generated by its indirect cost rate. See Decl. of Marcel Kerkmans ¶ 3 (Defs.' Ex. HH, filed concurrently with this Reply). Numerous other contractors utilize multiple rates. See Decl. of Deborah Moberly ¶ 35 (Defs.' Ex. DD, filed concurrently with this Reply).

⁷ See Moberly Decl. ¶ 26 (Defs.' Ex. DD) (explaining that many tribal contractors use provisional/final rates).

327, 108 S. Ct. 592, 606 (1988).

In response to Defendants' argument that Tunica cannot challenge the indirect cost methodology for years after 1996 because they do not have current rates for these years, they simply argue that the methodology under which their rates were obtained is illegal and therefore the injury is assumed. (Pls.' Opp. at 37-38.) It is not, as Plaintiffs' claim, "clear that [Tunica] received less contract support" under the rate-making system. To establish standing and ripeness, it is necessary to determine whether and to what extent other non-ISDA agencies did not pay the full amount of indirect costs generated by Tunica's rate in any given year. It may be that in one or more years all non-ISDA agencies did, in fact, pay the full amount of indirect costs generated by Tunica's rate. If that were the case, Tunica would have no standing to bring a claim to have the Court adjust or develop a new indirect cost rate for that year. All of these factual matters are unknown because Tunica did not negotiate a new rate for any year after 1996. As such, their claims are unripe.

Defendants also explained in their Motion that Plaintiffs' claims against NBC for rate adjustments for 1995-2001, if successful, would have no practical effect, because the readjustment of a rate separate and apart from its use in an actual contract would not change Plaintiffs' situation in any practical way. As such, Plaintiffs' claims for rate adjustment should be dismissed. (Defs.' Mem. at 36.)

CONCLUSION

For the reasons set forth above and in Defendants' (Renewed) Motion to Dismiss, Defendants' (Renewed) Motion to Dismiss should be granted, and Plaintiffs' Second Amended Complaint dismissed.

Respectfully submitted,

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