IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA; RAMAH NAVAJO SCHOOL BOARD, INC., Plaintiffs, v. 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.	Case No. 1:02CV02413 Judge Reggie B. Walton Magistrate Judge Deborah A. Robinson

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants United States, Michael O. Leavitt, Secretary of the U.S. Department of Health and Human Services, and P. Lynn Scarlett, Acting Secretary of the U.S. Department of the Interior, by and through undersigned counsel, hereby move this Court for an order granting summary judgment to them on all claims in the Second Amended Complaint. The facts and law supporting this Motion are set forth in the accompanying Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and a separately filed Local Rule 7.1(h) Statement of Material Facts.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

/s/Rachel J. Hines
____
SHEILA M. LIEBER
Deputy Director
RACHEL J. HINES (D.C. Bar #424774)
HANNAH Y.S. CHANOINE
Trial Attorneys
Federal Programs Branch, Room 7314
Civil Division
Mailing Address
P.O. Box 883
Washington, DC 20044
Delivery Address
20 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 514-5532
Facsimile: (202) 616-8202
E-mail: rachel.hines@usdoj.gov

Counsel for Defendants

Dated: May 27, 2006

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.	)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' lawsuit is fundamentally about attempting to charge the Indian Health Service ("IHS") for the overhead (indirect) costs that Plaintiffs incur in the administration of their full portfolio of grants and contracts--including many grants and contracts that have little or nothing to do with health care services or programs. The legal theories Plaintiffs have crafted to reach this result are contrary to the Indian Self-Determination and Education Assistance Act ("ISDA"), federal appropriations law, government cost allocation principles, and Plaintiffs' own contracts. Any rights that Plaintiffs have to indirect costs must flow directly from their ISDA contracts, a review of which demonstrates that IHS has fully performed on its contractual obligations. Defendants are thus entitled to summary judgment.

Although Plaintiffs agreed to the terms in their ISDA contracts related to indirect costs, including the term that permitted costs to be calculated on the basis of an indirect cost rate negotiated under Office of Management and Budget ("OMB") Circular A-87, they now argue that IHS's use of their rates in this manner violates the ISDA. But the ISDA directs IHS to pay only those costs that are directly attributable to IHS programs. Because indirect costs are costs that are by their nature difficult to allocate among the programs that they benefit, Congress fully intended that IHS would utilize federal cost allocation principles contained in OMB Circulars to determine which costs are directly attributable to the IHS programs. These principles have provided the default rule for the allocation of indirect costs to federal contracts and grants since before 1970 and well before the ISDA first provided for indirect cost funding of ISDA contracts. There is no indication that Congress intended to alter this longstanding rule and require instead that IHS pay indirect costs attributable to Plaintiffs' contracts and grants from other government agencies.

One of the more common cost allocation methods set forth in the Circulars relies on the assumption that the larger the program is in terms of funding, the more overhead it incurs. There

are other models, however, that rely on different assumptions, all with the goal of allocating costs fairly and equitably to the multiple programs that benefit from those costs. Under each of the methodologies, an indirect cost rate (or rates) is generated. The rate is an expression of the total overhead costs divided by all of the programs that benefit from the costs. The rate may then be applied against each individual program's share of funding. The amount generated from this application is the maximum amount of indirect costs that should be charged to that program. In reality, some federal programs have statutory or contractual limitations on the amount of indirect costs that can be recovered. Under the OMB Circulars, these programs are still allocated indirect costs because they benefit from the overhead and administrative services, but the contracting organization will be prohibited from recovering these costs by law.

The contractor thus must make a critical decision at the outset: (1) accept the contract or grant whose administration incurs indirect costs but does not allow their full recovery and find another means to cover these costs, or (2) decline the contract or grant entirely. While it may be a difficult choice, the decision is the contractor's alone. One of the primary goals of self-determination--particularly given limited federal and tribal resources--is to allow tribes and tribal organizations, and not the federal government, to make the hard choices about what programs and services will best serve their members. While a tribe or tribal organization has the choice to accept or decline a contract or grant, the ISDA and federal appropriations law do not allow them to shift the costs of programs that do not provide sufficient overhead funding to the health care programs run under IHS contracts. Congress intended IHS programs only to be charged overhead costs that relate to, are associated with, and are directly attributable to, IHS programs. Because IHS's use of indirect cost rates as a basis for indirect cost recovery is entirely consistent with the plain language and intent of the ISDA, Plaintiffs' challenge to their indirect cost rates must fail.

In sum, Plaintiffs may wish to avoid the consequences of the "bargains" that they made, both

with IHS, as well as with other federal agencies with which they contract that prohibit or limit indirect cost recovery. But there is no reason Plaintiffs should not "be held to their agreements." Madigan v. Hobin Lumber Co., 986 F.2d 1401, 1404 (Fed. Cir. 1993).[1]

STATUTORY BACKGROUND

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 the Department of Health and Human Services ("HHS") and the Secretary of Department of the Interior ("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 the Bureau of Indian Affairs ("BIA")] to Indian tribes and their members pursuant to Federal law." Id. § 450b(j).

At issue in this lawsuit are Plaintiffs' contracts with IHS, an agency within HHS. 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 id. § 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 (program) amount and contract support costs ("CSC"). At issue in this suit is the category of CSC called indirect CSC. See 25 U.S.C. § 450j-1(a)(3)(A). Indirect CSC are administrative costs that are shared by several

[1] The Court of Federal Claims, and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, interpret government contracts almost exclusively, see 41 U.S.C. § 609, 28 U.S.C. § 1295. Thus, the decisions of these courts are cited herein.

different programs or services, such as accountants or shared facilities. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). 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). Finally, all funding under the ISDA is subject to the availability of appropriations. See id. § 450j-1(b); id. § 450j(c).

Once the Secretary has received a proposal for an ISDA contract, he has 90 days either to (1) approve the proposal 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 id. § 450f(a)(2); 25 C.F.R. § 900.16. Notably, one of those bases is when "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 contractors. Since 1998, Congress has capped the funds that IHS may award for CSC directly in the appropriations acts. See, e.g., Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997) (Ex. U).[2]

In issuing a full or partial "declination," the Secretary must "state any objections in writing," "provide 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

[2] This Memorandum references Defendants' Exhibits A-OO. 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. Exhibit AA was filed on January 13, 2006, in conjunction with Defendants' (Renewed) Motion to Dismiss. Exhibits BB-NN were filed on May 19, 2006, in conjunction with Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment. Defendants have not re-filed these exhibits, but have provided copies to Chambers and Plaintiffs' counsel. Exhibit O was filed with this Motion.

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)(3). If a contractor chooses to go to federal court pursuant to 25 U.S.C. § 450m-1(a), the court may review the Secretary's full or partial declination decision for its compliance with ISDA and, if the decision is in error, may enjoin the Secretary "to reverse the declination finding . . . or 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 that the Secretary had declined. Congress carefully crafted the ISDA to give tribes and tribal organizations a range of choices and protections during the contract formation stage.

Once the parties execute (sign) an ISDA contract, all disputes for monetary relief arising under it are subject to the Contract Disputes Act ("CDA"). See id. §§ 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); 25 C.F.R. §§ 900.215-900.230. This presentment requirement is mandatory; the failure to present a claim bars a court from asserting jurisdiction over that claim. See SMS Data Prods. Group, Inc. v. United States, 19 Cl. Ct. 612, 615 (1990); Tunica Mem. Op. at 9 (docketed as #48). But the contractor has non-judicial, post-execution avenues of relief as well: if the contractor believes that funding is insufficient, the contractor may suspend the contract or may, after notice, give the program back to IHS. See 25 U.S.C. §§ 450*l*(c)(b)(5), 450j(e); 25 C.F.R. §§ 900.240 et seq.

While the ISDA defines indirect CSC and provides that indirect CSC shall be added to an ISDA contract pursuant to an annual funding agreement ("AFA"), it does not specify the amount of indirect CSC funding. The actual amount to be provided in the contract is the subject of a

negotiation between the tribe or tribal organization and IHS. Although some tribal contractors negotiate indirect CSC funding directly with IHS and others do not incur indirect CSC at all, many tribal contractors use a government-wide indirect cost rate (or rates) developed according to an OMB Circular as a basis for calculating indirect CSC funding. These rates are not issued by IHS. They are the result of a separate and independent negotiation between a government contractor and its "cognizant agency." See 2 C.F.R. Pt. 225, App. A, § A.6.

A contractor (including, but not limited to, tribal contractors) 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. Once the contractor has submitted an indirect cost rate proposal, the cognizant agency will review, negotiate, and ultimately approve an indirect cost rate or rates. See id. App. E, § E.1. A rate agreement is then signed by the contractor and 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. See id.

The Circulars also provide 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.

FACTUAL AND PROCEDURAL BACKGROUND

The Tunica-Biloxi Tribe of Louisiana ("Tunica") is a federally-recognized Tribe located in the State of Louisiana. See 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. See id. The Ramah Navajo School Board ("RNSB"), is a New Mexico non-profit corporation established by the Ramah Navajo Chapter of the Navajo Nation. See 2d Am. Compl. ¶ 9. Since 1976, RNSB has had a self-determination contract to run a health clinic. See id.

Both Plaintiffs negotiate indirect cost rates with the Department of the Interior ("DOI").[3] See First Declaration of Deborah Moberly ¶ 3 (Ex. AA). Tunica negotiated and signed fixed-with-carry-forward indirect cost rate agreements with DOI for the years 1995 (53.23%) and 1996 (54.78%). See id. ¶ 4. Tunica has not obtained an indirect cost rate for any year after 1996. See id. ¶ 6. RNSB has negotiated and signed fixed-with-carry-forward indirect cost rate agreements with DOI for 1995 (25.8%), 1996 (21.3%), 1997 (17.2%), 1998 (20.49%), 1999 (19.33%), 2000 (18.40%), 2001 (17.30%), 2002 (17.04%), 2003 (15.55%), and 2004 (17.5%). See id. ¶ 8; Second Declaration of Deborah A. Moberly ¶ 40 (Ex. DD).

The Second Amended Complaint alleges that Defendants violated the funding provisions of the ISDA applicable to indirect CSC. See 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 1995-1998, and claims for funding in 1998-2001. See id. ¶¶ 34-41. The Third Claim for Relief alleges breach of trust. See id. ¶¶ 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 the contracts, and injunctive relief. See id. at 15-16.

On March 31, 2003, Defendants filed a Motion to Dismiss the Second Amended Complaint (docketed as #13). In a Memorandum Opinion of December 9, 2003, amended January 22, 2004,

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[3] Since January 3, 2003, the agency within DOI responsible for rate negotiation has been the National Business Center ("NBC"). See 1st Moberly Decl.¶ 3 (Ex. AA). Prior to that time, this function was handled by DOI's Office of the Inspector General ("OIG"). See 1st Moberly Decl. ¶ 3 (Ex. AA).

the Court dismissed parts of the First and Second Claims for Relief and all of the Third Claim for Relief (docketed at #48). The Court ordered discovery and supplemental briefing on the remaining claims, which were Tunica's claims related to fiscal year 1995-2001 funding and RNSB's claims related to fiscal year 1995 and 1996 funding. See Tunica Mem. Op. at 15, nn.13, 17. Before re-briefing the remaining issues, the Supreme Court granted certiorari in an ISDA breach of contract case called Cherokee Nation v. United States. The Court stayed this case pending its resolution.

In Cherokee, the Supreme Court determined that the promises in ISDA contracts are like ordinary government promises and similar to procurement contracts. See 543 U.S. 631, 639, 125 S. Ct. 1172, 1178-79 (2005). 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 a breach of contract action by arguing that it had insufficient appropriations. See 543 U.S. at 639-44; 125 S. Ct. at 1177-81. 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. On January 12, 2006, Defendants filed a Renewed Motion to Dismiss and on January 13, 2006, Plaintiffs filed a Motion for Partial Summary Judgment. This Motion for Summary Judgment addresses Plaintiffs' claims on the merits. Additional facts relevant to this Motion are included in a Statement of Material Facts, submitted along with this Motion.

ARGUMENT

Defendants move for summary judgment on all claims. IHS fully performed under Plaintiffs' ISDA contracts, and there has been no breach. In addition, IHS's use of indirect cost rates calculated under OMB A-87 does not violate the ISDA.

I. STANDARDS FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

"Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (citing Fed. R. Civ. P. 1).

The initial burden is on the moving party to point out the absence of any genuine issue of material fact. See 477 U.S. at 323, 106 S. Ct. at 2552. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). The substantive law identifies which facts are material and "[f]actual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. at 248, 106 S. Ct. at 2510. Once the initial burden of the moving party is satisfied, the burden shifts to the responding party to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. See 477 U.S. at 250, 106 S. Ct. at 2511. In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Worth v. Jackson, 377 F. Supp. 2d 177, 181 (D.D.C. 2005). However, "the non-moving party cannot rely on mere allegations or denials but must set forth specific facts showing that there are genuine issues for trial." Id. at 180-81.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFFS' BREACH CLAIMS.

Plaintiffs allege that IHS breached their ISDA contracts by failing to provide additional indirect CSC. Defendants explained in their Motion to Dismiss that Plaintiffs did not properly present their breach claims under the mandatory jurisdictional requirements of the CDA, 41 U.S.C. § 605(a), thereby warranting dismissal of these claims. (Defs.' Mem. at 21.) But even if the Court

considers Plaintiffs' breach claims on the merits, a review of the terms and conditions of Plaintiffs' contracts demonstrates that IHS satisfied its contractual obligations. Therefore, Defendants are entitled to summary judgment.

A. The Law Applicable to Government Contracts.

Contract interpretation begins with the plain language of the contract. See Coast Fed. Bank v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). A contract should be interpreted as a whole and in a manner which gives "reasonable meaning to all its parts and avoids conflict or surplusage of its provisions." Granite Constr. Co. v. United States, 962 F.2d 998, 1003 (Fed. Cir. 1992). Moreover, the words of a contract "must be given their plain and ordinary meaning . . . in defining the rights and obligations of the parties[.]" Elden v. United States, 617 F.2d 254, 260-61 (Ct. Cl. 1980). An interpretation that gives reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless. See Fortec Constr. v. United States, 760 F.2d 1288, 1292 (Fed. Cir. 1985). The goal of contract interpretation is to ascertain the intent of the parties through the plain language that they chose. See Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988). Contract interpretation is a question of law that is an appropriate matter for summary judgment. See Martin v. United States, 20 Cl. Ct. 738, 745 (1990).

The Court has limited Tunica's breach claims to contracts in effect during fiscal years 1995-2001 and RNSB's breach claims to contracts in effect during fiscal years 1995-1996. See Tunica Mem. Op. at 15, nn.13, 17. As is demonstrated below, IHS awarded to Plaintiffs all of the CSC funding that IHS promised to award. Whereas the Cherokee case involved an admitted breach by IHS of Cherokee Nation and Shoshone-Paiute's ISDA contracts, see 543 U.S. at 636-37, 125 S. Ct. at 1177, this case does not involve an admission of breach because there has been none; IHS fully performed under the unique terms of Tunica and RNSB's agreements.

B. IHS Did Not Breach Tunica's Contracts.

The plain language of Tunica's contracts and annual funding agreements ("AFAs") demonstrates that IHS fully performed. For calendar year 1995, IHS promised to award Tunica $165,806 in indirect CSC funding. See Declaration of Ralph W. Ketcher, Jr. ¶ 11 (Ex. BB); see also Ex. I at 2 (adding $21,383 indirect costs to the contract); I at 53 (adding $118,911); I at 56 (adding $25,512). IHS provided this amount to Tunica. See Ketcher Decl. ¶ 11 (Ex. BB). Tunica admits that it received this amount. (Ex. C at 2.) The AFA states that IHS was to base the amount of indirect cost funding on an indirect cost rate that Tunica negotiated with DOI. (Ex. I at 23, 53, 57.) IHS used Tunica's indirect cost rate as the basis for calculating Tunica's indirect CSC funding. See Ketcher Decl. ¶¶ 11, 32 (Ex. BB). Accordingly, there was no breach.

Similarly, for calendar year 1996, IHS promised to award Tunica $162,691 in indirect CSC funding. See id. ¶ 14; see also J at 23 (adding $158,832 in indirect costs); J at 76 (adding $3,859). IHS provided this amount to Tunica. See Ketcher Decl. ¶ 14 (Ex. BB). Tunica admits that it received this amount. (Ex. C at 1.) The AFA states that IHS was to base the amount of indirect cost funding on an indirect cost rate that Tunica negotiated with DOI. (Ex. J at 23.) IHS used Tunica's indirect cost rate as the basis for calculating Tunica's indirect CSC funding of $162,691. See Ketcher Decl. ¶¶ 14, 32 (Ex. BB). Again, there was no breach.[4]

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[4] Now that Tunica's actual costs are known for 1995 and 1996, it appears that they were not as high as anticipated. Therefore, it appears that IHS has provided to Tunica more than its share of Tunica's costs. Tunica's information shows that, in 1995, the indirect costs that IHS provided Tunica ($165,806) was in excess of IHS's proportional share of the actual indirect costs incurred by Tunica ($143,147). See 2d Moberly Decl. ¶ 61 (Ex. DD). Similarly, in 1996, the amount of indirect costs that IHS provided to it ($162,691) was in excess of IHS's proportional share ($160,878). See id. ¶ 62. Both the Tenth and Federal Circuits have emphasized that under no circumstances should an ISDA contractor get a windfall. See Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (Fed. Cir. 2005); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1464 (10th Cir. 1997). Plaintiffs' own witness, Marcel Kerkmans, testified that an ISDA contractor should not recover more than its costs. See Kerkmans Dep. at 52:13-53:8 (Ex. GG). No construction of the ISDA allows for indirect costs in excess of those incurred.

IHS made similar CSC funding promises to Tunica for 1997 ($163,016), 1998 ($163,016), 1999 ($176,273), 2000 ($174,966), and 2001 ($228,610). See id. ¶¶ 17, 19, 21, 26, 27 (Ex. BB); see also Ex. J at 79, 82, 101, 158, 182; K at 20, 38, 45-46, 50, 58, 61, 69, 71-73, 76. IHS provided Tunica with the CSC funding promised in each AFA. See Ketcher Decl. ¶¶ 17, 19, 21, 26, 27 (Ex. BB). And the AFAs contained similar promises indicating that IHS would base indirect CSC funding on an indirect cost rate that Tunica negotiated with DOI, see Ex. J at 79, 101, 158, K at 20, which IHS did, see Ketcher Decl. ¶ 32 (Ex. BB). None of Tunica's contracts have been breached.[5]

Even if the Court were to construe Tunica's contracts and AFAs as requiring more funding than IHS awarded, Defendants have an additional defense related to the 1998-2001 contracts. Tunica's 1998-2001 contracts and AFAs were made subject to the availability of appropriations. See Ex. J at 7 ¶ 4; Ex. K at 7 ¶ 4. Starting in 1998, Congress capped IHS's CSC appropriation[6] and, for these years, the total capped CSC appropriation was less than the total of all of the requests from

[5] Before execution of the agreements, IHS advised Tunica not to expect any additional funding. See Ketcher Decl. ¶¶ 28, 29 (Ex. BB). Therefore, Tunica could not have had a reasonable expectation in any year that IHS would provide it with all of the funding it requested or incurred. Moreover, although Tunica claims that it was not able to provide sufficient health care services to its members, see Pls.' Mem. at 1, Tunica never notified IHS that it was suspending the contract due to insufficient funding or was planning to give the program back to IHS, see Ketcher Decl. ¶ 31 (Ex. BB). Finally, Tunica admits that the level of services that it was able to provide ensured that it did not breach the contract. See Pls.' Resp. to Interrogs. 28, 29, 30 (Ex. LL at 6-8). Tunica had sufficient knowledge of the amount of funding that IHS would provide and the remedial options available to it if it was dissatisfied with this amount.

[6] See Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83, 1589 (1997) (appropriating an amount not to exceed $161,202,000 for ongoing CSC to be available to IHS for obligation for one year) (Ex. U); Omnibus Consol. & Emergency Supp. 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 ongoing 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).

tribal contractors to IHS for CSC. See Declaration of Thomas Thompson ¶ 6 (Ex. JJ). Therefore, in each year since 1998, IHS has divided the available appropriations pursuant to published policies in order to provide as much funding as possible to its tribal contractors. See id.; see, e.g., Pls.' Ex. 14 (IHS CSC guidance for 1996-2000). For each of these years, IHS obligated the vast majority of the CSC appropriation, and the minor unobligated amounts were due to deobligations, refunds or administrative errors. See Thompson Decl. ¶¶ 6, 15-20 (Ex. JJ). Moreover, Congress made the CSC appropriations available for one year. See id.; supra n.6. Therefore, the minor amounts, if any, that were not obligated during the years at issue have lapsed as a matter of law. See 31 U.S.C. § 1301(c); City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1427 (D.C. Cir. 1994).

This express condition limited the amount of CSC funding under Tunica's contracts. See Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1345 (D.C. Cir. 1996) (explaining that the statutory language making funding of CSC "subject to the availability of appropriations" means that "the Secretary need only distribute the amount of money appropriated by Congress under the Act," but "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA "entitles" it to the funds"); Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1377-78 (Fed. Cir. 1999) (explaining that the ability of BIA "to bind the Government contractually was expressly conditioned on the availability" of appropriations and that "to repeal the unambiguous language of [ISDA]" and conclude that the tribe had either a "statutory or contractual right to additional funding for its [CSC]" would exceed the judicial function); Tunica Mem. Op. at 23-26 (citing Ramah and Oglala for the proposition that the cap limits the amount of CSC that IHS can distribute but directing IHS to establish that the funds were actually disbursed).

While IHS fully performed its promises under all of Tunica's contracts, under no circumstances can Tunica recover any additional CSC funding under its 1998-2001 contracts. See generally Cherokee, 543 U.S. at 642, 125 S. Ct. at 1181 (explaining that whether appropriations are

available for purposes of ISDA contracts depends on express limitations or the absence thereof in the appropriations acts and concluding that IHS's 1995-1997 appropriations were unrestricted). Defendants are entitled to summary judgment on Tunica's breach claims.

C. IHS Did Not Breach RNSB's Contracts.

Similarly, IHS fully performed under RNSB's contract and AFAs, and any award by this Court of additional CSC funding would provide RNSB with a windfall. IHS and RNSB executed an ISDA contract in 1988, which remained in effect in 1995 and 1996. See Declaration of Veronica Zuni ¶ 7 (Ex. CC); Ex. L, M. The contract contained a limitation of cost clause which read:

> Subject to the General Provision Clause 3, "Limitation of Cost" the total cost to the Government, including all direct and indirect costs for the performance of this contract, shall not exceed [ ] until and unless the Contractor is notified in writing by the Contracting Officer that this ceiling amount has been increased.

(Ex. L at 12-13.) The dollar amount (the ceiling) for the Limitation of Cost Clause was originally set at $498,897 in 1988 (Ex. L at 12), and was increased every few months through the end of calendar year 1996, (Ex. M at 34). By the end of calendar year 1996, the dollar amount of the contract (the ceiling), including all funding and CSC, was $12,379,510. (Ex. M. at 34.) By the end of calendar year 1996, IHS had distributed this exact amount to RNSB. See Zuni Decl. ¶ 18 (Ex. CC). Under the limitation of cost provision, IHS made clear to RNSB the exact amount of ISDA funding that would be made available. A limitation of cost unambiguously limits the government's liability. See Advanced Materials, Inc. v. Perry, 108 F.3d 307, 310 (Fed. Cir. 1997); Sociotechnical Research Applications, Inc. v. Whitman, No. 01-1232, 2002 WL 123557, at *3-4 (Fed. Cir. 2002); Titan Corp. v. West, 129 F.3d 1479, 1482 (Fed. Cir. 1997); LSi Serv. Corp. v. United States, 422 F.2d 1334, 1335-36 (Ct. Cl. 1970). A limitation of cost clause puts the contractor on notice that it should not incur costs in excess of the amount specified because the government will not pay for any excess and ensures that the government does not obligate itself to open-ended liability in violation

of the Anti-Deficiency Act, 31 U.S.C. § 1341. Because IHS limited its liability to $12,379,510 and awarded this amount to RNSB, there was no breach.[7]

In addition, RNSB's AFAs specified the amount of funding that IHS would make available to it for indirect CSC, e.g., $328,505 (1995) and $336,720 (1996). See Ex. O at 10, 21-22; Zuni Decl. ¶¶ 10, 15 (Ex. CC). IHS provided these amounts to RNSB. See Zuni Decl. ¶¶ 11, 16 (Ex. CC). RNSB admits that it received these amounts. (Ex. E at 2.) The AFAs also specified that IHS would base the amount of indirect CSC funding on an indirect cost rate that RNSB negotiated with DOI. (Ex. L at 12; O at 10, 21-22.) Because IHS used RNSB's rate as the basis for the indirect CSC funding that IHS then provided, see Zuni Decl. ¶ 23 (Ex. CC), there was no breach.[8]

Finally, now that RNSB's actual costs are known for 1995 and 1996, it appears that they were

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[7] Before execution of the agreements, IHS advised RNSB not to expect any additional funding. See Zuni Decl. ¶ 20 (Ex. CC). Therefore, RNSB could not have had a reasonable expectation in any year that IHS would provide it with all of the funding it requested or incurred. Moreover, although RNSB claims that it was not able to provide sufficient health care services to its members, see Pls.' Mem. at 1, RNSB never notified IHS that it was suspending the contract due to insufficient funding or was planning to give the program back to IHS, see Zuni Decl. ¶ 22 (Ex. CC). Finally, RNSB admits that the level of services that it was able to provide ensured that it did not breach the contract. See Pls.' Resp. to Interrogs. 11, 12 (Ex. LL at 4-5). RNSB had sufficient knowledge of the amount of funding that IHS would provide and the remedial options available to it if it was dissatisfied with this amount.

[8] RNSB may argue that IHS agreed to provide additional CSC funding to it because the AFAs state generally that IHS will request and provide additional funds for indirect CSC. (Ex. O at 10, 21-22.) To the extent that the Court believes that these provisions conflict with those described above, the specific provisions govern the general ones. 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). The general and unspecific provision stating that IHS will provide more funding should not be read to the exclusion of the specific provision identifying the actual funding levels. RNSB may also argue that its contract is ambiguous with respect to the amount of CSC funding IHS promised to provide. But if RNSB believed that the AFAs were ambiguous in this respect, the law required them to seek a clarification before execution. See Tilley Constr. & Eng'rs., Inc. v. United States, 15 Cl. Ct. 559, 566 (1988); J.B. Steel Inc. v. United States, 810 F.2d 1139, 1141 (Fed. Cir. 1987); Fortec, 760 F.2d at 1291; Collins Int'l Serv. v. United States, 744 F.2d 812, 814 (Fed. Cir. 1984). This rule, devised to prohibit government contractors from taking advantage of patent ambiguities, runs counter to the doctrine that ambiguities are to be construed against the drafter. See Tilley Constr., 15 Cl. Ct. at 566.

not as high as estimated and that RNSB has already recovered from IHS the share of its total indirect costs incurred attributable to IHS contracts. In 1995, the amount of indirect costs that IHS provided RNSB ($382,160) was in excess of IHS's proportional share of the actual indirect costs incurred by RNSB ($251,335). See 2d Moberly Decl. ¶ 55 (Ex. DD); see also Pls.' Resp. to Defs.' Req. for Admissions 1-5 (Ex. MM at 3-4). While DOI made an adjustment to RNSB's 1997 indirect cost rate to take this over-recovery into account, any additional recovery of indirect costs from IHS would be in excess of IHS's share of indirect costs for 1995. See 2d Moberly Decl. ¶ 55 (Ex. DD). Similarly, in 1996, the amount of indirect costs that IHS provided RNSB ($405,681) was in excess of IHS's proportional share ($343,424). See id. ¶ 56; see also Pls.' Resp. to Defs.' Req. for Admissions 12-14 (Ex. MM at 6). While DOI again made an adjustment to RNSB's 1998 indirect cost rate to take this over-recovery into account, any additional recovery of 1996 indirect costs from IHS would again be in excess of IHS's share. See 2d Moberly Decl. ¶ 56 (Ex. DD).

Both the Tenth and Federal Circuits have emphasized that under no circumstances should an ISDA contractor get a windfall. See Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (Fed. Cir. 2005); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1464 (10th Cir. 1997). Plaintiffs' own witness, Marcel Kerkmans, testified that an ISDA contractor should not recover more than its costs. See Deposition of Marcel Kerkmans at 52:13-53:8 (Ex. GG). No construction of the ISDA allows for indirect costs in excess of those incurred by the contractor. Defendants should be granted summary judgment on RNSB's breach claims.[9]

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[9] It is expected that Plaintiffs will argue that because the actual terms of the ISDA are incorporated into their contracts, an additional obligation to pay CSC exists. (Pls.' Mem. at 14-15.) As Defendants explained in their Motion to Dismiss, the terms of the ISDA do not create an entitlement to a specific amount of CSC. See Samish, 419 F.3d at 1367. The amount of funding for CSC is the subject of a negotiation between the parties. 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). But even if the ISDA did create an entitlement, the specific CSC contract terms setting funding levels should govern over the general contract terms incorporating the statute. See Hometown Fin., 409 F.3d at 1369; Conoco,

III. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFFS' RATE CLAIMS.

Plaintiffs also allege that IHS's use of indirect cost rates negotiated by Plaintiffs with DOI and calculated under OMB-87 as the basis for determining Plaintiffs' indirect cost funding for inclusion in IHS ISDA contracts violates the ISDA. See 2d Am. Compl. ¶ 2; Mem. of Points and Auth. in Supp. of Pls.' Mot. for Partial Summ. Judg. at 1 (hereinafter "Pls.' Mem."). Specifically, Plaintiffs allege that IHS's use of the rates violates 25 U.S.C. §§ 450j-1(a)(2), (a)(3) and 450j-1(g). See 2d Am. Compl. ¶¶ 16-17; Pls.' Mem. at 14. As support, they reference the Tenth Circuit's decision in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) ("RNC"), a case that Plaintiffs allege held that OMB A-87 violates the ISDA. See 2d Am. Compl. ¶ 3; Pls.' Mem. at 16-17. Plaintiffs allege that RNC stands for the proposition that when indirect costs associated with an ISDA program are fixed, the OMB A-87 rate must be adjusted to exclude from the direct cost base those programs that do not pay indirect costs. See Pls.' Mem. at 16-17. Plaintiffs also challenge the carry-forward computation portion of the rate calculation, see 2d Am. Compl. ¶ 23; Pls.' Mem. at 27-28, which is the computation by which DOI makes adjustments to ensure that a contractor has not recovered more costs than it actually incurred. Because both of Plaintiffs' theories involve the shifting of the costs of other programs onto the IHS programs, they are inconsistent with federal law.

As a preliminary matter, as explained in Defendants' Motion to Dismiss, for all years in which Plaintiffs negotiated indirect cost rates with DOI, they signed indirect cost rate agreements

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91 F.3d at 1527. While ISDA contracts are to be construed liberally for the benefit of the contractor, see 25 U.S.C. 450*l*(c), it would render the intent of the parties meaningless to construe the contract's specific funding provisions inapplicable in favor of general and indeterminate language. Moreover, the law governing patent ambiguities, described supra n.8, would foreclose this type of argument as well.

accepting their rates.[10] See Ex. to 1st Moberly Decl. (Ex. AA). Each agreement included the actual rate, the fact that it was negotiated under OMB A-87, and a section called "Acceptance", with the text "Listed below are the signatures of acceptance for this agreement." Id. In all instances, the signatures of a representative of Tunica or RNSB and a representative of DOI follow. Id. Because Plaintiffs voluntarily and knowingly accepted their indirect cost rates negotiated with DOI under OMB A-87, they have affirmatively waived any claim that their agreed-upon rates were contrary to law. See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997).[11]

Defendants also explained that Plaintiffs have not yet utilized the administrative remedies available to them under OMB A-87, 2 C.F.R. Pt. 225, App. E, § F.4, and DOI's appeals process, 43 C.F.R. §§ 4.1 et seq. (Defs.' Mem. at 37-38, 42-43.) Because Plaintiffs admit that they failed to exhaust the internal administrative disputes process, see Pls.' Resp. to Defs.' Req. for Admissions 10, 17, 20, 23 (Ex. MM at 5-9), and instead assented to their indirect cost rates, Plaintiffs should not be permitted to challenge their existing rates on the merits. And, for all years in which Plaintiffs did not negotiate indirect cost rates with DOI (i.e., Tunica for 1997-2001), any challenge to the rates for

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[10] RNSB submitted an indirect cost rate proposal to DOI seeking a 25.1% rate for 1995. See Ex. NN at 2. The final rate RNSB negotiated with DOI was higher (25.8%). See 1st Moberly Decl. ¶ 8 (Ex. AA). In addition, neither Plaintiff took advantage of the flexible methodologies available in OMB A-87 that might have addressed some of the issues raised in this case. See, e.g., Pls.' Resp. to Defs.' Req. for Admission 9, 16, 19, 22 (Ex. MM at 5-9). Any claimed injury is belied by the fact that Plaintiffs did not ask in the first instance for a rate adjustment similar to that they are requesting here.

[11] 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); E. Walters & Co., Inc. v. United States, 576 F.2d 362, 368 (Ct. Cl. 1978); Mexican Intermodal Equip., S.A. de C.V. v. United States, 61 Fed. Cl. 55, 70 (2004); Flink/Vulcan v. United States, 63 Fed. Cl. 292, 307-08 (2004); 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, 217 F.3d 850 (Fed. Cir. Sept. 9, 1999) (unpublished mem.).

those years is unripe.[12] 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).

Finally, Defendants pointed in their Motion to Dismiss to the fact that Plaintiffs contracted with IHS to use their OMB A-87 indirect cost rates as the basis for indirect cost funding.[13] (Defs.' Mem. at 37-38). They have thus confirmed their original intention to waive any claims challenging their rates. Plaintiffs have had multiple opportunities to challenge their indirect cost rates but have failed to do so. Instead, they made the knowing and voluntary choice to utilize their rates as a basis for receiving indirect CSC funding from IHS. All of these reasons provide a basis for dismissal of Plaintiffs' claims. Defendants, however, also move for summary judgment on the merits of Plaintiffs' rate claims to demonstrate that OMB A-87 is entirely consistent with the ISDA.

A. The Nature and Treatment of Indirect Costs Under Federal Law.

Indirect costs first appeared in the ISDA in 1988 and were defined as "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." 25 U.S.C. § 450b(f). This definition was taken directly from OMB A-87. See 2 C.F.R. Pt. 225, App. A, § F.1.

Deborah Moberly, Indirect Cost Services Coordinator at DOI's National Business Center, explains that an example of an indirect cost might be the salary of a payroll clerk. See 2d Moberly Decl. ¶ 8 (Ex. DD). This payroll clerk may issue paychecks for staff that work on four different

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[12] Because Tunica's most current rate is from 1996, IHS may be calculating Tunica's indirect CSC funding on the basis of a greatly inflated rate. See Ketcher Decl. ¶ 33 (Ex. BB). Similarly, Ms. Moberly explained that because Tunica has not negotiated a new indirect cost rate for any year since 1996, she cannot determine whether and to what extent Tunica recovered the total amount of indirect costs that it actually incurred. See Moberly Decl. ¶ 60 (Ex. DD).

[13] The ISDA regulations contemplate that a contractor may negotiate and agree to the use of provisions of OMB Circulars in its ISDA contract. See 25 C.F.R. § 900.37.

programs run by one organization. See id. The payroll clerk "benefits" the four programs by ensuring that staff for each program gets paid, and thus his salary is not easily attributable to just one of the programs. See id. It also might be inefficient and time-consuming to have the clerk keep track of the amount of time he works on each of the four programs because the work he performs is not easily segregable. See id. The salary of the payroll clerk in this example--incurred by an organization for a common or joint purpose benefitting more than one program and difficult to directly allocate to the programs served–is a quintessential indirect cost. See id.

Determining how to allocate an indirect cost such as the payroll's clerk's salary to the four programs requires a formula or methodology that ensures that each of the four programs is allocated its fair share of indirect costs (regardless of any constraints on the program's ability to pay) but also ensures that no one program is allocated more than its fair share.

1. Federal appropriations law.

The determination of how to allocate indirect costs to each of the programs is critical because if one of the programs is a federal program funded through congressional appropriations, over-charging a federal program may violate the terms of the underlying appropriations. The Appropriations Clause of the Constitution commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Appropriations Clause "vests Congress with exclusive power over the federal purse," assuring that "Congress has absolute control of the moneys of the United States." Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 185 (D.C. Cir. 1992) (citation and internal quotation marks omitted); see also Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424, 110 S. Ct. 2465, 2471 (1990) (explaining that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress") (citation and internal quotation marks omitted). Federal law further provides that appropriations shall be applied only to the objects for which they

were made except as otherwise provided for by law. See 31 U.S.C. § 1301(a) (the stated purpose, time, and amount of any appropriation governs); see also Alabama v. Shalala, 124 F. Supp. 2d 1250, 1269 (M.D. Ala. 2000) ("A general principle of federal appropriations law provides that federal funds may be used only for authorized purposes."); Dep't of Soc. Serv. v. Sullivan, 904 F.2d 710, 1990 WL 81840, at *3 (9th Cir. June 18, 1990) (unpublished mem.) (explaining that when California received program funds from HHS and USDA and used shared administrative services to run the programs, California could not charge costs to IHS that were allocable to USDA without violating 31 U.S.C. § 1301(a)); Maine v. Shalala, 81 F. Supp. 2d 91, 98 (D. Me. 1999) (explaining that cost shifting is not permitted under federal law).

When Congress appropriates funds for a specific purpose, e.g., to the U.S. Department of Agriculture in order to distribute grants to state or tribal governments to provide school lunches to children, these funds must be spent for this purpose only. See 31 U.S.C. § 1301(a). If this appropriation further provides that the grantees may use only 10% of their grant funds for overhead costs associated with providing the school lunches, no funds in excess of 10% for each grantee may be expended for overhead costs from this appropriation. See id. To do otherwise would violate § 1301(a) and the express text of the appropriation.

2. Federal cost allocation principles.

For many years, government cost allocation guidelines consistent with federal appropriations law have been found in three Circulars, OMB A-21, 2 C.F.R. Pt. 220 (for educational organizations); OMB A-87, 2 C.F.R. Pt. 225 (for state, local, and tribal governments), and OMB A-122, 2 C.F.R. Pt. 230 (for nonprofit organizations). Although they each provide guidance for a different type of organization, the principles in all three Circulars are the same: the indirect cost (e.g., the salary of the payroll clerk) must be equitably allocated over the four programs that are benefitted by the costs (e.g., the services of the payroll clerk). In recognition of 31 U.S.C. § 1301(a), the Circulars prohibit

"cost-shifting." See, e.g., 2 C.F.R. Pt. 225, App. A, § F.3.b ("Amounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation."); see also Alabama, 124 F. Supp. 2d at 1269 (explaining that cost shifting is impermissible). Cf. Arizona v. Thompson, 281 F.3d 248, 256-57 (D.C. Cir. 2002) (interpreting statute as allowing for allocation method other than OMB A-87, but capping administrative costs at 15%).

The Circulars have flexible methodologies for an organization, such as a State, Local or Tribal Government, to allocate indirect costs to all programs that benefit. These methodologies provide a means to determine the maximum amount of indirect costs that can be charged to a federal award, unless more or less is permitted by law. Application of the general methodologies in the Circulars to a government contractor's unique circumstances yields an indirect cost rate or rates which can then be used as permitted under any of the contractor's contracts or grants.

3. The calculation of indirect cost rates under cost allocation principles.

In general, an indirect cost rate is the ratio of the total amount of reasonable and allowable indirect costs (called an "indirect cost pool") to total program funding that benefits from those indirect costs (called a "direct cost base"). See 2 C.F.R. Pt. 225, App. E, § B.3; 2d Moberly Decl. ¶ 12 (Ex. DD). The ratio yields an indirect cost rate (indirect cost pool / direct cost base). See id. Table 1 provides a sample:

Table 1: Sample 2006 Negotiation for Contractor A.

Indirect Costs	
Administrative Assistant	$40,000
Human Resources Director	$68,000
Payroll Clerk	$20,000
Grants and Contracts Officer	$28,000
Procurement Officer	$38,000
Rent	$40,000
Security Guards	$48,000
Office Supplies	$18,000
Total Indirect Costs	**$300,000**
Direct Cost Base	
Bureau of Indian Affairs (BIA)	$700,000
Indian Health Services (IHS) Clinic	$500,000
EPA Program	$200,000
School Lunch Program (USDA)	$100,000
State Program	$500,000
Tribal Program	$1,000,000
Total Direct Cost Base	**$3,000,000**

The simple calculation for Contractor A, based on the figures above, is $300,000 (indirect cost pool) over $3,000,000 (direct cost base) = .1 or 10% (indirect cost rate). See Moberly Decl. ¶¶ 15-16 (Ex. DD). Once the rate is generated, it may be applied to the portion of the base associated with each program to determine the maximum amount of costs that can be equitably allocated to the program. For example, to determine the maximum amount of indirect costs that could be charged to the BIA programs, one would multiply the rate (10%) by the BIA portion of the base ($700,000), to get $70,000. The rate would be applied to the IHS program, resulting in the allocation of $50,000 in indirect costs, to the EPA program, resulting in $20,000 in indirect costs, to the School Lunch Program, resulting in $10,000 in indirect costs, to the State Program, resulting in $50,000 in indirect

costs, and to the Tribal program, resulting in $100,000 in indirect costs. Together, these allocations equal $300,000. The formula, however, is for allocating costs, and the Circulars specify that there is no expectation of recovery created by the rate methodology. See 2 C.F.R. § 225.20; 2d Moberly Decl. ¶¶ 44-45 (Ex. DD). The amount actually recoverable is determined by reference to the underlying contract or grant.[14] See id.

The Circulars also provide for different types of rates or rate structures, depending on the needs of the organization and what would be most equitable. See 2d Moberly Decl. ¶ 17 (Ex. DD). The first type of rate is the "fixed" rate, often called a "fixed-with-carry-forward" rate, which is a rate that is based both on an estimate of the costs expected to be incurred for the applicable period and on a subsequent adjustment (called a carry-forward) that takes into account the difference between the estimated costs and the actual costs from an earlier period. See 2 C.F.R. Pt. 225, App. E, § 6; 2d Moberly Decl. ¶ 18 (Ex. DD). The purpose of the carry-forward is to account for the difference between a contractors' actual costs and recoveries from an earlier period and what the contractor was allocated based on its estimates. See id. For example, Contractor A's 2006 negotiation would involve estimated 2006 costs with a carry-forward adjustment based on actual 2004 costs. See 2d Moberly Decl. ¶ 18 (Ex. DD). The carry-forward increases or decreases the indirect cost pool to reflect any under-recovery or over-recovery of indirect costs from the earlier year. See id. Since before 1995, tribes and tribal organizations have used a slightly modified fixed-

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[14] Even within the simplified (single rate) method, there are variations depending on the organization. For example, if allocating costs over the sheer funding amounts will not be equitable, i.e., the larger programs do not use indirect costs as much as the smaller programs, then the contractor can utilize a different base, i.e., salaries and fringe. See 2 C.F.R. Pt. 225, App. E, § B.4; 2d Moberly Decl. ¶ 14 (Ex. DD). The costs will thus not be allocated over program size, but staff size. See id. Contractors may opt to use one of three bases: total salaries and wages with or without fringe benefits or total modified direct costs less capital expenditures and pass-through. The base that most equitably distributes the indirect costs to the programs based on the benefits received by the program is the one that should be used. See id.

with-carry-forward rate methodology. See id. The modified methodology uses both recoverable and actual recoveries of indirect costs in the computation. See id. Taking the example again from Ms. Moberly's declaration, a sample modified carry-forward computation is as follows:

Table 2: Sample Modified Carry-Forward Computation for Contractor A.

Column	**A**	**B**	**C**	**D**	**E**	**F**	**G**
	2004 Actual Direct Cost Base	**% of Total**	**2004 Indirect Cost Pool**	**Indirect Rate @12%**	**Indirect Cost Collections**	**Shortfall**	**Carry-forward**
BIA	$600,000	24%	$60,000	$72,000	$70,000	0	-10,000
IHS	$500,000	20%	$50,000	$60,000	$60,000	0	-10,000
EPA	$300,000	12%	$30,000	$36,000	$35,000	0	-5,000
USDA	$100,000	4%	$10,000	$12,000	$10,000	0	0
State	$400,000	16%	$40,000	$48,000	$35,000	5,000	0
Tribal	$600,000	24%	$60,000	$72,000	(internal)	(internal)	(internal)
Total	$2,500,000	100%	$250,000	$300,000	$210,000	5,000	-25,000

The sample carry-forward computation considers three things:

(a) Over-recoveries (when Column E > Column C). An example of an over-recovery is shown in the BIA row. Column E is $70,000 (amount actually paid by BIA), which is greater than Column C, which is $60,000 (BIA's proportional share of the indirect costs incurred). Contractor A over-recovered from BIA. A $10,000 over-recovery is carried forward in Column G.

(b) Under-recoveries based on the difference between estimated costs and actual costs (Column D < Column C).

(c) Under-recoveries (shortfalls) based on legal or contractual limitations (if Column D < Column C, then Column D minus Column E is the shortfall; if Column D > Column C, then Column C minus Column E is the shortfall). Contractor A has one under-recovery based on a shortfall in the State program. This shortfall, in the amount of $5,000, is the difference between what was incurred for the State program ($40,000) and what was collected ($35,000). Because this amount represents a legal or contractual limitation on the State program, it is not carried forward.

See 2d Moberly Decl. ¶¶ 21, 23 (Ex. DD).

The total carry-forward (the sum of categories (a) and (b)) is added or subtracted from the indirect cost pool. See id. The fixed-with-carry-forward rate computation, resulting in a rate of 9.17%, is as follows:

Table 3: Sample Calculation of a Fixed-with-Carry-Forward Rate for Contractor A.

FY 2006 Indirect Costs	$300,000
FY 2004 Over-recovery Carry-forward	-$25,000
FY 2006 Indirect Cost Pool	$275,000
FY 2006 Direct Cost Base	$3,000,000
FY 2006 Indirect Cost Rate	$275,000/$3,000,000=9.17%

Another type of rate available to contractors requires negotiating two indirect cost rates for each year. See 2 C.F.R. Pt. 225, App. E, § B.7, B.8; 2d Moberly Decl. ¶ 25 (Ex. DD). They are called provisional/final rates. See id. First, a provisional (temporary) indirect cost rate is generated using estimates of the contractor's expected or historical costs. See 2d Moberly Decl. ¶ 25 (Ex. DD). A final rate is generated after actual costs for that period are known, usually within six months after the end of the period covered by the rate. See id. Under a provisional/final rate, over and under-recoveries are handled by the funding agency and are not considered in the rate calculation. See id.

The Circulars also allow contractors to negotiate more than one rate (called either the multiple allocation base method or "special" rates). See 2 C.F.R. Pt. 225, App. E, § C.3, C.4; 2d Moberly Decl. ¶ 29 (Ex. DD). Multiple rates are available to government contractors when indirect costs benefit the contractor's programs in varying degrees. See id. An example might be when some of the programs in the contractor's base benefit from the indirect costs to a greater degree than the other programs. See 2d Moberly Decl. ¶ 29 (Ex. DD). The purpose of allowing contractors to have multiple rates is to allocate indirect costs to programs relative to the benefits received by those programs. See 2 C.F.R. Pt. 225, App. E, § C.3, C.4; 2d Moberly Decl. ¶ 29 (Ex. DD).

4. The use of indirect cost rates under federal contracts and grants.

The cognizant agency (here, DOI) is not involved with the funding of contracts or grants. See 2d Moberly Decl. ¶ 45 (Ex. DD). A funding agency (such as IHS, BIA, or USDA) may or may not use an indirect cost rate as the basis for the actual reimbursement or award of indirect costs. See 2 C.F.R. § 225.20. In addition, the methods for recovering indirect costs vary by program. For example, IHS and BIA pay indirect costs in addition to direct program dollars. Other federal grants and contracts include indirect costs in the funding and deduct them from the total program funding. See generally Declaration of Marcel Kerkmans ¶ 10 (Pls.' Ex. 1).

As a general matter, an indirect cost rate is applied against each program's portion of the direct cost base to yield an amount of indirect costs allocable to that program. The negotiation of a rate, however, does not authorize the award of indirect costs or establish the total indirect costs required by any contract's funding agency. See 2 C.F.R. § 225.20; 2d Moberly Decl. ¶¶ 44-45 (Ex. DD). The Circular makes clear that where the funding source restricts the recovery of indirect costs, that restriction governs. See id.; see also State of Ohio Rehab. Serv. Comm'n v. United States Dep't of Educ., 101 F.3d 702, 1996 WL 665608, at *2 (6th Cir. Nov. 14, 1996) (unpublished mem.); Kentucky ex rel. Cabinet for Human Res. v. United States, 16 Cl. Ct. 755, 764 (1989); Maine, 81 F. Supp. 2d at 96 n.4. Contrary to Plaintiffs' contention that the OMB A-87 system assumes that other federal agencies pay indirect costs, (Pls.' Mem. at 1), OMB A-87 is clear that the award of indirect costs is dependent on the law governing each funding agency's expenditure of funds as well as the terms of any individual contract or grant. See id. At bottom, the contractor must choose whether to accept federal funds, notwithstanding a cost recovery restriction, or decline to funds entirely. Once the contractor has made the choice to accept the funds, however, they must be included in the base if they benefit from the indirect cost pool.

B. The ISDA Permits IHS to Pay Only Those Costs that are Incurred in Connection with IHS Programs.

The methodologies described above--equitably allocating indirect costs in relation to the benefit received--are entirely consistent with the mandates in the ISDA. As will be explained below, the ISDA makes clear that IHS cannot pay indirect costs incurred in connection with non-IHS programs. Plaintiffs' contention, that the ISDA requires IHS to pay the shortfall of other non-IHS programs, is without any support.

1. The rate adjustment proposed by Plaintiffs.

Plaintiffs' first proposed rate adjustment would involve keeping the indirect cost pool (the numerator) the same, i.e., pooling all of the costs associated with running all of Plaintiffs' contracts and grants, while adjusting the direct cost base (the denominator) to take out all of the programs that do not allow recovery of indirect costs. Under OMB A-87, if Contractor A has $300,000 in indirect costs which benefit $3,000,000 in total program funding, the ratio would be 300,000 to 3,000,000 or 10%, as shown in Table 1. As shown in Table 2, however, Contractor A does not recover from the State program the portion of the Contractor's indirect costs that are attributable to the State's program (the State's portion is $40,000 and the State only awards $35,000). Therefore, under Plaintiffs' adjustment, Contractor A's rate would be calculated only after first removing the funding for the State program (the $500,000 from Table 1) from the base. This is notwithstanding the fact that the State program benefits from those costs (if they did not benefit, the OMB Circulars would not require them to be included in the base at all). Plaintiffs' adjustment would result in an indirect cost pool of $300,000 allocated over a base of $2,500,000, resulting in a rate of 12%.

Although the costs generated by the IHS programs under the OMB A-87 methodology (without the carry-forward) would only generate $50,000 in indirect costs, applying Plaintiffs' adjusted rate would result in an allocation of $60,000 in costs to the IHS programs. The relative

benefit to the IHS programs, however, has not changed. As this example makes clear, Plaintiffs' theory would allocate the costs associated with the State program to IHS.[15]

Plaintiffs' second adjustment would also shift (or spread) the shortfalls of one program to all of the other programs through an adjustment to the carry-forward computation. See 2d Am. Compl. ¶ 23. Under OMB A-87, Contractor A's $5,000 shortfall from the State program cannot be carried forward because it represents a legal or contractual limitation related to the State program. If this shortfall was carried forward, the State program's shortfall would be re-allocated to all of the other programs in a future year. See 2d Moberly Decl. ¶ 23 (Ex. DD). Plaintiffs' proposed adjustment, which in the example of Contractor would carry forward the $5,000 shortfall from the State program, would unlawfully circumvent legal and statutory limitations precluding particular agencies from allowing full recovery of indirect costs. Under Plaintiffs' adjustment, Contractor A's $5,000 shortfall from the 2004 State program would be carried forward as an under-recovery in Column G of Table 2, as shown here:

Table 4: Plaintiffs' Adjustment to Carry-Forward Computation for Contractor A.

Column	A	B	C	D	E	F	G
	2004 Actual Direct Cost Base	% of Total	2004 Indirect Cost Pool	Indirect Rate @12%	Indirect Cost Collections	Shortfall	Carry-forward
BIA	$600,000	24%	$60,000	$72,000	$70,000	0	-10,000
IHS	$500,000	20%	$50,000	$60,000	$60,000	0	-10,000
EPA	$300,000	12%	$30,000	$36,000	$35,000	0	-5,000
USDA	$100,000	4%	$10,000	$12,000	$10,000	0	0
State	**$400,000**	**16%**	**$40,000**	**$48,000**	**$35,000**	**0**	**5,000**
Tribal	$600,000	24%	$60,000	$72,000	(internal)	(internal)	(internal)
Total	$2,500,000	100%	$250,000	$300,000	$210,000	0	-20,000

[15] It is not entirely clear whether Plaintiffs' proposed rate adjustment would credit IHS for the indirect costs that are paid by other federal agencies (i.e., in the example of Contractor A, $35,000). But even if Plaintiffs accounted for the costs that were paid, the adjustment still impermissibly shifts to IHS those costs that are not paid.

The total over-recovery in Column G would be reduced from -$25,000 to -$20,000. Then, the 2006 indirect cost pool in Table 3 would increase from $275,000 to $280,000, as below.

Table 5: Plaintiffs' Adjustment to Rate Calculation for Contractor A.

FY 2006 Indirect Costs	$300,000
FY 2004 Over-recovery Carry-forward	**-$20,000**
FY 2006 Indirect Cost Pool	**$280,000**
FY 2006 Direct Cost Base	$3,000,000
FY 2006 Indirect Cost Rate	**$280,000**/$3,000,000=**9.33%**

Under Plaintiffs' adjustment, the rate would then be calculated as $280,000 divided by $3,000,000, or 9.33% (instead of 9.17%), see Table 3). All of the programs in the 2006 base would be allocated indirect costs at a 9.33% rate, resulting in a greater amount of costs allocated to these programs. Under this example, the costs allocated to the IHS programs would increase from $45,850 to $46,650, despite the IHS program not having received any greater benefit from the indirect cost pool. Both of Plaintiffs' adjustments would result in IHS shouldering indirect costs not associated with or directly attributable to its programs, which is contrary to the ISDA.

2. The rate adjustments proposed by Plaintiffs are contrary to the ISDA.

In construing a statute such as the ISDA, the Court must review its plain language. See United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002). An analysis of a statute "begins with the language of the statute. . . . [a]nd where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S. Ct. 755, 760 (1999) (citation and internal quotation marks omitted). "Whether statutory language is plain depends on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Barnes, 295 F.3d at 1359 (citation and internal quotation marks omitted). Moreover, in interpreting statutes, Congress is assumed to know the law and legislate against the

backdrop of existing legal principles. See Haig v. Agee, 453 U.S. 280, 297, 101 S. Ct. 2766, 2777 (1981); Cannon v. Univ. of Chicago, 441 U.S. 677, 697-99, 99 S. Ct. 1946, 1958 (1979); Wash. Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1450 (D.C. Cir. 1994). When "Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Neder v. United States, 527 U.S. 1, 21, 119 S. Ct. 1827, 1840 (1999) (citation and internal quotation marks omitted).

The ISDA was first enacted in 1975. See Pub. L. No. 93-638, 88 Stat. 2203 (1975). It directed the Secretaries of DOI and HHS to enter into self-determination contracts upon the request of a tribe or tribal organization, see id. §§ 102, 103 and it provided that funding for these contracts "shall not be less than the appropriate secretary would have otherwise provided for his direct operation of the programs[,]" id. § 106. Congress did not explicitly direct the Secretaries to pay indirect CSC, but soon thereafter, both IHS and BIA promulgated regulations (in effect until 1996) that provided for the payment of some indirect costs associated with ISDA contracts under the federal cost allocation principles. See, e.g., 42 C.F.R. §§ 36.235 (1987) (providing that IHS ISDA contractors would receive funding for indirect costs); 48 C.F.R. §§ 352.280-4(a)5); 352.380-4 (providing that IHS ISDA contracts would include standard indirect cost clauses); 25 C.F.R. § 271.54 (1987) (providing for indirect costs associated with BIA ISDA contracts).[16]

It was not until 1988 that Congress passed the first set of major amendments to the ISDA.

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[16] In 1996, new regulations applicable to ISDA contracts were promulgated. These regulations provide, inter alia, that an ISDA contractor may submit a proposal for an ISDA contract that includes either an indirect cost rate negotiated under OMB A-87 or a estimated lump-sum amount for indirect costs. See 25 C.F.R. § 900.8(h). Similarly, IHS's non-binding policies permit tribal contractors either to negotiate a lump sum of indirect CSC funding directly with IHS or to base the funding amount on an indirect cost rate negotiated under the OMB Circulars. See Indian Self-Determination Mem. No. 92-2 at 6-7 (Pls.' Ex. 13), and IHS Circular No. 96-04 at 6-7 (Pls.' Ex. 14); Ketcher Decl. ¶ 35 (Ex. BB); Zuni Decl. ¶ 27 (Ex. CC).

In the 1988 amendments, Congress amended the funding provisions and for the first time addressed indirect costs directly in the ISDA. See Indian Self-Determination & Educ. Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, §§ 103, 205 (1988). Congress added the following provision:

> (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.
> (2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of 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.

Id. § 205 (codified at 25 U.S.C. § 450j-1(a)). Significantly, Congress then defined "indirect costs" for purposes of the ISDA in the same manner as indirect costs were defined under the pre-existing OMB Circulars. See id. § 103(f) (codified at 25 U.S.C. § 450b(f)); 35 Fed. Reg. 18797, 18799 (1970). By incorporation of the government-wide OMB A-87 definition, the plain language of the 1988 amendments demonstrates that Congress fully expected IHS and BIA to continue to fund indirect costs on the basis of the pre-existing OMB A-87 methodology. There is no reason to think that Congress would intend to newly define indirect costs, fail to include that definition, and instead use a definition from a regulation that they did not mean to incorporate.

Other parts of the 1988 amendments demonstrate Congress's intent to allow IHS and BIA to award indirect costs on the basis of indirect cost rates negotiated under OMB A-87 without any adjustment. Congress defined the term "indirect cost rate" in the 1988 amendments as "the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency[.]" Id. § 103(g) (codified as 25 U.S.C. § 450b(g)). Congress also added a requirement that IHS and BIA report to it on shortfalls in the funding of CSC. See id. § 205(c)

(codified as 25 U.S.C. § 450j-1(c)). This report was to identify "the indirect cost rate and the type of rate for each tribal organization." Id. By these references, Congress evinced not only its understanding that IHS and BIA may not be able to fully fund CSC, but its knowledge and approval of the government-wide indirect cost rate system.

Another section of the 1988 amendments addressed appropriations shortfalls not of IHS or BIA, but of other federal agencies with which the tribal organization contracted:

> (1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.
> (2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

Id. § 205(d)(1) (codified at 25 U.S.C. § 450j-1(d)).

Because this section addresses the over and under-recoveries associated with the rate methodologies in OMB A-87, Congress again demonstrated its understanding that BIA and IHS would continue to award indirect cost funding on the basis of OMB A-87 rates and that certain federal agencies would continue to disallow or limit indirect cost recovery. This provision does not state that IHS or BIA should pay the shortfalls generated by other agencies' programs; instead, it provides that shortfalls should not work to the detriment of the contractor, and that IHS and BIA still must fund indirect costs associated with their programs.

In another provision, Congress directly cited OMB A-87, in recognition of the fact that IHS and BIA calculated indirect CSC on the basis of indirect cost rates developed under these principles:

> Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget

Circular A-87, incurred for fiscal years prior to fiscal year 1988.

Id. § 205(e) (codified as 25 U.S.C. § 450j-1(e)).[17] Each of these provisions demonstrates that Congress fully intended IHS and BIA to pay indirect costs on the basis of an OMB rate, with certain caveats not having anything to do with shifting all of a contractor's costs to IHS. Congress further clarified this intention in 1994, when it again amended the ISDA. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994). Congress included a new paragraph to § 450j-1(a), which read:

> 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 [direct CSC]. . . and . . . 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[.]

See id. § 102(14) (emphasis added) (codified at 25 U.S.C. § 450j-1(a)(3)).

Thus, Congress further specified that indirect CSC under the ISDA were limited to "overhead incurred by the contractor in connection with the operation" of IHS program under contract. As of 1994, the ISDA clearly prohibited the payment of indirect costs incurred in connection with any non-IHS program, regardless of whether that program allowed for indirect cost recovery.

The legislative history of the 1988 and 1994 amendments further supports this interpretation.[18] Congress was aware of the indirect cost rate methodology in the OMB Circulars and

[17] The other provision on which Plaintiffs rely, 25 U.S.C. § 450j-1(g), was added in 1988 and repeats that the funding provided for in § 450j-1(a) should be added to the ISDA contract.

[18] Plaintiffs may urge that any ambiguity in the statute should be resolved in favor of Plaintiffs due to the canon of construction that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit. The Supreme Court has specifically held that before courts conclude that a statute is ambiguous and apply this canon, they must first consider the statute's plain text, its purpose, and its legislative history to discern Congress's intent. See DeCoteau v. Dist. County Ct., 420 U.S. 425, 444-45, 95 S. Ct. 1082, 1093 (1975); United States v. Thompson, 941 F.2d 1074, 1077-78 (10th Cir. 1991).

approved of its use. See, e.g., S. Rep. No. 100-274, 1988 U.S.C.C.A.N. 2620, at 2627-32, 2636-37 (1988).[19] Similarly, in 1994, Congress explained that "[t]he amendment does not alter the process employed by many tribal contractors for negotiating indirect cost agreements with the appropriate cognizant agency for purposes of cost-recovery accounting under the Act." 140 Cong. Rec. H11140, H11144, 103rd Cong., 2d Sess., 1994 WL 553621 (Oct. 6, 1994).

Plaintiffs may recite various statements made by members of Congress criticizing IHS's indirect cost policies prior to the passage of the 1988 and 1994 amendments, but these criticisms were not acted upon and, to the contrary, were contradicted by the final legislation. In fact, there have been many failed legislative attempts to do what Plaintiffs wish to be done here, i.e., have the IHS and BIA pay for all of the tribal contractor's indirect costs. See, e.g., S. 2928, 101 Cong., 2d Sess (July 27, 1990).

The ISDA bars the payment of indirect costs associated with any program other than the ISDA program under contract. Only costs associated with or incurred in connection with IHS programs may be recovered from IHS. Thus, Plaintiffs' proposed rate adjustments, which would shift the costs of non-IHS programs to IHS, lack support in the law.[20]

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[19] Congress explained that it used the term 'indirect costs' because that term "is associated with known management practices. Those practices are recognized and defined in [OMB A-87.] The circular anticipates a variety of organizational structures, and therefore allows maximum flexibility while excluding unallowable costs. The indirect cost system described in OMB Circular A-87 is used not only by tribal governments, but also by state governments, counties, municipalities, universities, hospitals, and nonprofit organizations. The intent of the legislation is to end the confusion by making clear that the Congress supports payment of indirect costs associated with self-determination contracts[.]" S. Rep. No. 100-274, 1988 U.S.C.C.A.N. 2620, at 2627-32, 2636-37 (1988).

[20] Plaintiffs' interpretation of the ISDA would lead to an absurdity in that if both IHS and BIA were required to pay all costs not paid by all other funding agencies, Plaintiffs would recover twice. Statutory interpretations that would produce absurd results should be avoided. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S. Ct. 3245, 3252 (1982).

3. Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

Notwithstanding the plain language of the ISDA, in 1997, the Tenth Circuit found that the ISDA was ambiguous with respect to whether the ISDA required BIA to fund more than BIA's share of indirect costs as calculated under OMB A-87. See RNC, 112 F.3d at 1461-62. The case originated out of a lawsuit brought in 1990 by the Ramah Navajo Chapter on behalf of BIA ISDA contractors. See RNC v. Babbitt, No. 90-0957, slip op. at 1 (D.N.M. Nov. 4, 1998) (Ex. EE). RNC challenged the OMB A-87 methodology as violating the ISDA. The facts underlying the lawsuit involved RNC's seven contracts. Five of those contracts were ISDA contracts entered into with BIA, for a total in program funding of $755,770. See id. at 3. RNC also had two contracts with the State of New Mexico, with program funding totaling $62,927. See id. The indirect cost pool, i.e., those costs necessary to administer these seven contracts, was $364,021. See id. Under the OMB A-87 methodology, RNC's rate was calculated as 44.5%. See id. at 4. Under this rate, a total of $336,318 in indirect costs would be allocated to BIA and a total of $28,003 in indirect costs would be allocated to New Mexico. RNC argued, however, that the ISDA required BIA to pay all of RNC's indirect costs, even those costs associated with the New Mexico programs. See id. RNC thus proposed that its rate be adjusted to exclude the New Mexico program funds from the base before calculating the rate. See id. at 5. RNC's adjustment resulted in the rate calculation as $364,021 / $755,700=48.17%. See id.

The district court agreed with BIA and found that the ISDA was clear and unambiguous in requiring BIA to only pay those costs "associated with its contracts" and thus found that the allocation method contained in OMB A-87 and BIA's regulations was a proper method of determining the costs associated with BIA's programs. See id. at 10-11.

On appeal, the Tenth Circuit reversed, holding that the indirect cost rates used in the BIA contracts violated the ISDA. See RNC, 112 F.3d at 1463. Pivotal to the court's analysis was its

determination that the ISDA provisions mandating payment of indirect CSC were ambiguous on the question of the "extent to which indirect costs are to be funded by defendants." Id. at 1461. (analyzing 25 U.S.C. §§ 450j-1(a)(2) and 450j-1(d)). In light of the perceived ambiguity, the court relied on the canon of statutory construction interpreting ambiguous provisions to the benefit of Native Americans. Id. The Tenth Circuit stated that although inclusion of the New Mexico program funds in the direct costs base "would have been proper if those programs included funding for their apportioned share of the indirect costs pool, the uncontroverted facts indicate they did not." Id. By including these funds in the direct costs base, the court found that the defendants had "deprived plaintiff of full indirect costs funding for fiscal year 1989." Id. at 1463. The Tenth Circuit also believed that RNC's costs were fixed. See id. Thus, the court required BIA to pay those costs associated with the New Mexico programs. See id.

4. Immediate Congressional response to Ramah Navajo Chapter.

After the Tenth Circuit's decision, Congress proposed legislation to clarify its intent in the ISDA that only those costs directly attributable to IHS programs under contract could be funded by IHS. Within approximately a year of the Tenth Circuit's decision, Congress had enacted a new ISDA provision, which provides:

> Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C.A. § 450f et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Pub. L. No. 105-277, Div. A, § 101(e), 112 Stat. 2681-231 (1998) (codified as 25 U.S.C. § 450j-2).[21]

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[21] Congress later enacted a similar provision that applies to BIA funding, but unlike § 450j-2 which applies "[b]efore, on, and after October 21, 1998," the new § 450j-3 applies

Congress made abundantly clear its intention that IHS cannot pay for any indirect costs not attributable to IHS self-determination contracts. Congress enacted this provision soon after RNC, made it clear that this was always the law ("[b]efore, on and after October 21, 1998"), and thus stated unequivocally that the cost-shifting endorsed by the Tenth Circuit was not permissible. See id.

This clarification forecloses any argument that the ISDA has ever allowed--much less required--that IHS pay indirect costs attributable to non-IHS programs. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 1800-01 (1969) (explaining that subsequent legislation declaring intent of an earlier statute is entitled to great weight in statutory construction); Liquilux Gas Corp. v. Martin Gas Sales, Inc., 979 F.2d 887, 890 (1st Cir. 1992) (same); McCreary v. Offner, 1 F. Supp. 2d 32, 37 (D.D.C. 1998) (same), aff'd, 172 F.3d 76 (D.C. Cir. 1999).

Moreover, 25 U.S.C. § 450j-2 is a clarification of the ISDA and not a substantive amendment, because shortly before its enactment, the Tenth Circuit had found an ambiguity in the funding provisions of the ISDA. Under these circumstances, courts generally interpret such enactments as clarification and not as substantive amendments. See Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259, 1266 (9th Cir. 1997) (construing later enactment as a clarification in light of, inter alia, a split of authority in the courts as to the meaning of original provision); Liquilux, 979 F.2d at 890 (explaining that when a new enactment follows the discovery of an ambiguity, the enactment is construed as a clarification and not a substantive amendment); Porter v. Comm'r, 856 F.2d 1205, 1209-10 (8th Cir. 1988) (same); Barnes v. Cohen, 749 F.2d 1009, 1015 (3d Cir. 1984) (when there is a dispute about ambiguity, subsequent amendment generally construed as a clarification); Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 615 (7th Cir.1982) (citing 2A Sutherland Statutory Constr. § 49.11, at 265-66 (4th ed. 1973), and explaining that statutory

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strictly "on and after November 29, 1999." 25 U.S.C. § 450j-3.

construction of enactment to determine if it clarifies or is a subsequent amendment involves reviewing the state of the law at the time of the enactment); see also United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985) ("Statutes may be passed purely to make what was intended all along even more unmistakably clear.").

Section 450j-2 is entirely distinguishable from § 314 of the 1999 Appropriations Act, 112 Stat. 2681-288, the ISDA provision at issue in Cherokee. See 543 U.S. at 645, 125 S. Ct. at 1182. The Supreme Court held that § 314 could not be a "clarification" because the underlying provision that the United States argued it had clarified was unambiguous. See 543 U.S. at 645-46, 125 S. Ct. at 1182-83. Concluding that § 314 was a substantive amendment, the Court construed it so that it did not need to consider whether it could be applied retroactively to the plaintiffs' contracts. See id. In contrast, the Tenth Circuit held that certain provisions in the ISDA were ambiguous, see RNC, 112 F.3d at 1461, necessitating the clarification in § 450j-2 enacted less than one year later.

Because 25 U.S.C. § 450j-2 was a clarification and not a substantive amendment, there are no retroactivity concerns attendant to the Court's application of the ISDA, as clarified by § 450j-2, to Plaintiffs' contracts in effect before § 450j-2's enactment. See Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. 1999); Beverly, 132 F.3d at 1266; Montgomery County, 761 F.2d at 1003; McCreary, 1 F. Supp. 2d at 36.

While § 450j-2 itself is plain and unambiguous, any question about its meaning can be resolved by the legislative history. The relevant House Report describes the provision as "specifying that Indian Health Service funding may not be used to pay contract support costs for any entity other than the Indian Health Service." H.R. Rep. No. 106-609, at 110 (1998) (excerpts attached as Ex. OO); see also id. at 108 (same). In the same report, the Appropriations Committee expressed concern "about the Ramah Navajo Chapter v. Lujan settlement concerning contract support costs" and further that it believed "that the court in [RNC] made an erroneous decision and that the

Administration erred by failing to appeal." Id. at 57. Congressional intent to prevent another decision like the Tenth Circuit's could not be more transparent. See Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004) ("In determining whether an amendment clarifies or changes existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment."); Piamba, 177 F.3d at 1284 ("[C]ourts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment."). Plaintiffs' claims here, which follow both the 1994 and the 1998 amendments to the ISDA, must therefore fail.

C. The Facts Presented in This Case Distinguish It From Ramah Navajo Chapter.

Even were the Court to agree with the Tenth Circuit's pre-1998 statutory interpretation or decline to apply the 1998 amendment to Plaintiffs' 1995-1997 ISDA contracts, there are significant factual distinctions between Plaintiffs and RNC that also direct a different conclusion. The critical facts that are discussed in the Tenth Circuit decision are (1) RNC's indirect costs were fixed, and (2) the State of New Mexico did not pay any indirect costs. See RNC, 112 F.3d at 1461-62. Neither of these facts is present here.

1. Plaintiffs' costs are not fixed.

According to expert Charles Wilkins, C.P.A., indirect costs may be classified into one of four categories: fixed costs, semi-fixed costs, variable costs, or semi-variable costs. See Expert Report of Charles L. Wilkins at 4-5 (Ex. II). These terms describe the manner in which indirect costs change or fluctuate based upon revenue changes. See id. at 4-5. Fixed costs are costs in which there is little correlation between the indirect costs and revenue. See id. at 4. In other words, a true fixed cost is a cost that is necessary whether the organization is large or small, e.g., a CEO. See id. Variable costs are the opposite, they have a total correlation with revenue. See id. at 5. As revenue increases, so do variable costs, and as revenue decreases, variable costs decrease as well. See id. In between these two types of costs are semi-fixed costs and semi-variable costs. See id. at 4-5.

The Tenth Circuit concluded that RNC's indirect costs were fixed. See RNC, 112 F.3d at 1461. Although not entirely clear, it appears that the court believed that RNC would incur $364,021 in indirect costs whether or not it administered the New Mexico programs. In other words, the court appeared to believe that the revenue change caused by the inclusion or exclusion of the New Mexico programs in the direct cost base would have no impact on the total amount of indirect costs incurred by RNC. Whether or not this is an accurate reflection of how RNC's costs would react to a change in revenue, the same cannot be said of Plaintiffs' indirect costs.

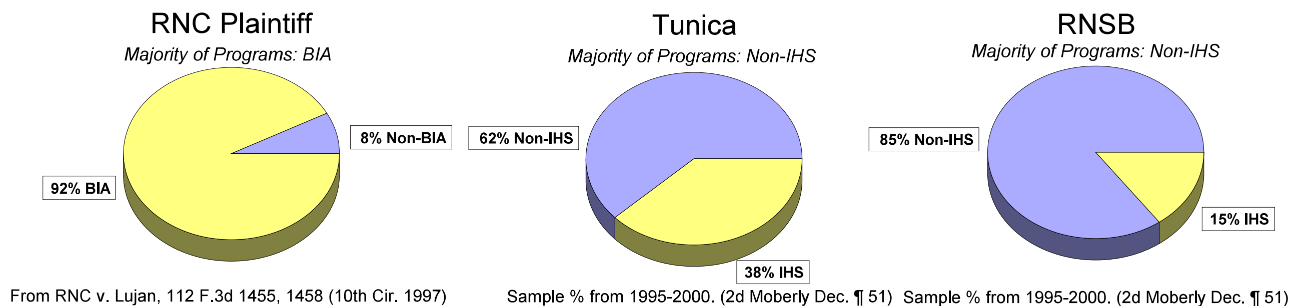
Mr. Wilkins, an expert in government cost allocation and cost principles, has reviewed the indirect costs incurred by Plaintiffs in all years relevant here and has concluded that their costs are not fixed. See Wilkins Rep. at 3 (Ex. II) ("My opinion is that Plaintiffs' indirect costs, taken as a whole, are not fixed"). To reach this conclusion, he first analyzed the types (categories) of costs incurred by these two Plaintiffs. See id. at 9-15. Tunica incurred costs related to depreciation, office supplies, travel, utilities, telephone, repairs and maintenance, insurance, professional services, and a tribal newspaper. See id. at 11. All of these costs are variable, semi-variable, or semi-fixed costs. See id. Thus, they will increase or decrease in relation to revenue changes. See id. at 15. Similarly, RNSB's costs are not fixed and thus will fluctuate in relation to revenue changes. See id. at 14, 15.

Mr. Wilkins also reviewed the historical changes in Plaintiffs' indirect costs. See id. at 9-15. He found that Tunica's costs grew even when revenue did not change. See id. at 12-13. As such, he concluded that Tunica's costs cannot be fixed. See id. Were Tunica's costs fixed, they would not have increased when revenue stayed the same. See id. A review of RNSB's historical changes is inconclusive because there has been no significant change in revenue. Based on a review of Tunica and RNSB's categories of indirect costs as well as Tunica's historical trends, Mr. Wilkins has concluded that Plaintiffs' costs are not fixed. See id. at 15. His analysis demonstrates that there is no support for Plaintiffs' conclusory statements that their costs are fixed, see 2d Am. Compl. ¶ 21;

Kerkmans Decl. ¶ 18 (Pls.' Ex. 1);[22] Decl. of Marlene Martinez ¶ 6 (Pls.' Ex. 4), and as such, that they have presented circumstances quite different than those presented in RNC.

While RNC's indirect costs did not undergo this type of comprehensive analysis, there are some additional facts that might have led the Tenth Circuit to conclude that RNC's costs were fixed. In that case, RNC's BIA programs comprised 92.7% of their base and the State of New Mexico programs comprised just 6.3% of the base. See RNC, 112 F.3d at 1458. Given this fact, it is at least conceivable that a 6% shift in revenue (the inclusion or exclusion of the New Mexico programs) would not effect a large change in RNC's indirect costs. In contrast, neither Tunica nor RNSB have anywhere close to 92% of their direct cost bases comprised of IHS contracts. See 2d Moberly Decl. ¶ 51 (Ex. DD). For example, between 1995-2000, IHS programs comprised only approximately 15-23% of RNSB's direct cost base. See id. Between 1995-1997, only approximately 38-46% of Tunica's direct cost base was comprised of IHS programs. See id. The contrasting proportions are demonstrated in the following chart.

Chart 6. Difference in Base Proportions Between RNC and Plaintiffs.



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[22] Mr. Kerkmans's testimony adds little to the issues raised in this case. He is a not a Certified Public Accountant and he testified that he has only worked for one ISDA contractor contracting with IHS and has never worked for IHS, BIA, or NBC. See Kerkmans Dep. at 9:21-22, 19:2-4, 90:21-91:4 (Ex. GG). His declaration similarly recites that he consults with BIA, not IHS, contractors. See Kerkmans Decl. ¶ 2 (Pls.' Ex. 1). When questioned further about his work for BIA tribal contractors, he admits that he has worked for under ten BIA contractors. See id. at 9:21-22 (Ex. GG). Finally, he testified that he does not know about IHS cost allocation. See id. at 207:5-208:5 (Ex. GG). He thus lacks both the personal knowledge and the expertise to opine in this matter as well as to make sweeping statements about "most contractors," Kerkmans Decl. ¶¶ 9, 13, 14 (Pls.' Ex. 1), and "most federal agencies," id. ¶ 12.

Given these facts, it is inconceivable that the exclusion of the non-IHS programs from Plaintiffs' direct cost bases (a shift in revenue of approximately 60% for Tunica and approximately 85% for RNSB), would not effect a corresponding decrease in Plaintiffs' indirect costs. In fact, the opposite is true. Because Plaintiffs' indirect costs are not fixed, a shift in revenue would have a corresponding effect on the amount of indirect costs. See Wilkins Rep. at 14-15 (Ex. II).

2. Plaintiffs recover indirect costs from other federal agencies.

Another unique feature of the RNC matter was that the only other program in the contractor's base besides the BIA programs was the New Mexico programs that did not pay any indirect costs. See RNC, 112 F.3d at 1458. This scenario is quite different from that of these Plaintiffs, notwithstanding their general allegation that other federal agencies do not pay indirect costs.[23] See 2d Am. Compl. ¶ 21. Ms. Moberly, who regularly reviews tribal contractors' funding, has stated that many non-ISDA agencies do, in fact, provide indirect cost recovery. See 2d Moberly Decl. ¶ 65 (Ex. DD). For example, RNSB recovered a significant amount of indirect costs from non-IHS programs in 1995. See id.¶ 66. In fact, the total amount of indirect costs that RNSB recovered from all of its contracts and grants was $1,886,094, notwithstanding that it only incurred $1,745,380 in indirect costs. See id.; see also Pls.' Resp. to Defs.' Req. for Admissions 1-2 (Ex. MM at 3). Similarly, Tunica, whose base is largely comprised of IHS and BIA programs, recovers indirect costs from BIA and likewise cannot argue that "other federal agencies do not pay indirect costs." The factual predicate underlying the RNC case is not present here.

D. The OMB Circulars Are Flexible And Provide Alternative Methodologies that May Address Plaintiffs' Circumstances.

Plaintiffs' witness Marcel Kerkmans has attested to the various methodologies in the

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[23] One of Plaintiffs' own witnesses undercuts this general and unsupported allegation. See Martinez Decl. ¶ 14 (Pls.' Ex. 6) (testifying that non-IHS federal agencies reimbursed RNSB the full amount generated by RNSB's indirect cost rate).

Circular. See Kerkmans Aff. ¶¶ 3-4 (Ex. HH). He stated that the use of "multiple rates" under OMB A-87 allowed one contractor to recover close to 100% of its indirect costs. See id. Multiple rates are available to any government contractor that can demonstrate that their use would more equitably allocate indirect costs. See 2d Moberly Decl. ¶ 35 (Ex. DD). Contrary to Plaintiffs' contention, (Pls.' Ex. 1 at 14), DOI does not discourage, much less prohibit, their use nor does it consider more widespread use of multiple rates to be overly burdensome. See 2d Moberly Decl. ¶ 35 (Ex. DD). Many contractors currently have multiple rates.[24] See id. Plaintiffs could also avoid the carry-forward computation if they negotiated provisional/final rates as described above. Many contractors, including tribal contractors, utilize provisional/final rates. See id. ¶ 26. The choice of what type of rate to negotiate is made by the contractor. See id. ¶ 27.

As described above, there are many flexible methodologies in the Circular that are available to all tribal contractors as long as it is demonstrated that one particular methodology more equitably allocates indirect costs. Plaintiffs complain that these alternative methodologies are too expensive, but the cost to a government contractor of hiring a consultant to assist in preparing an indirect cost rate proposal that best takes advantage of the different methodologies is itself an allowable indirect cost. See id. ¶ 36. In sum, if the contractor believes that particular programs (e.g., IHS programs) benefit to a greater degree from the indirect cost pool than the other programs, the contractor may be able to take advantage of multiple base allocations or special rates. See id.

Exploring these options and determining what is best for their organizations is one of the

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[24] Mr. Kerkmans's cursory explanation of the methodologies available under OMB A-87, (Pls.' Ex. 1), is both erroneous, see generally 2d Moberly Decl. (Ex. DD); 2 C.F.R. Pt. 225, App. A, E, and undercut by his own experience working for the Alamo Navajo School Board, a contractor that has successfully used multiple rates since before 1993. When queried about why he thought other contractors could not take advantage of these same methodologies, he stated that they were "too complicated," a statement that is belied by the fact that Alamo had only seven staff. See Kerkmans Dep. at 84:6-87:1 (Ex. GG).

rights, but also one of the responsibilities, of self-determination. The Court should decline to consider striking down a government-wide cost allocation system when Plaintiffs have ignored the many administrative and contractual remedies available to them.

CONCLUSION

For the foregoing reasons, Defendants' Motion For Summary Judgment should be granted and judgment entered for Defendants. First, IHS fully performed under the terms and conditions of Plaintiffs' contracts, and there has been no breach. Second, IHS's use of indirect cost rates negotiated between tribal contractors and their cognizant agency under OMB A-87 does not violate the ISDA. Defendants are entitled to summary judgment on all claims.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

/s/Rachel J. Hines
____
SHEILA M. LIEBER
Deputy Director
RACHEL J. HINES (D.C. Bar #424774)
HANNAH Y.S. CHANOINE
Trial Attorneys
Federal Programs Branch, Room 7314
Civil Division
Mailing Address
P.O. Box 883
Washington, DC 20044
Delivery Address
20 Massachusetts Avenue, NW
Washington, DC 20001
Telephone: (202) 514-5532
Facsimile: (202) 616-8202
E-mail: rachel.hines@usdoj.gov

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Counsel for Defendants