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## INTRODUCTION

### Overview

This case involves Indian health care, a trust responsibility of the United States.

Plaintiffs Tunica-Biloxi Tribe of Louisiana and Ramah Navajo School Board, Inc., are health care contractors under an omnibus federal statute that marked a radical change in federal Indian policy. Both Plaintiffs have contracted with the Defendant Secretary to provide medical care to members of their respective communities that the Secretary would have otherwise been obligated to provide himself.

In the early 1970s, after decades of disastrous federal administration of the trust responsibility to Indian tribes, Congress decided to end Indian tribes' dependence on a distant and unresponsive federal bureaucracy and instead give them the opportunity to run federal programs – including health services – themselves. The law was enacted as the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (“ISDA”). The mechanism would be a contract, an enforceable bargain. *Id.* § 450f.<sup>1</sup>

From its enactment in 1975 the new Act spawned resistance from the two agencies charged with carrying out this law, the Bureau of Indian Affairs and the Indian Health Service. Both argued that ISDA agreements though called contracts were not subject to federal contract law. In March 2005 the U.S. Supreme Court in an 8-0 decision summarily rejected this tenuous theory, ruling that indeed ISDA contracts are real contracts subject to the same body of law as ordinary procurement

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<sup>1</sup> The law was first proposed by President Nixon in a SPECIAL MESSAGE TO CONGRESS ON INDIAN AFFAIRS, Pub. Papers 564 (Richard M. Nixon) 6 Pres. Doc. 894 (1970).

contracts. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S.Ct. 1172 (2005) (“*Cherokee*” or “*Cherokee v. Leavitt*”).

### **The Lawsuit**

This law suit seeks damages and equitable relief for failure to properly calculate and pay mandated amounts of contract support costs necessary to carry out ISDA contracts at the same level at which the Secretary would operate them (“the program level”). Along with damages, it seeks to require the Indian Health Service to properly calculate that vital funding component in the future. Contract support costs are costs over and above the levels the Secretary would spend to run the contracted program if he were in control: Indian tribes do not get free legal services from the Justice Department, do not tap into the pension and health care programs of the federal government, must pay for workmen’s compensation, and must purchase insurance (which the Executive Branch does not need to buy since it insures itself). Contract support covers these kinds of costs. Without it fewer doctors, less equipment, and fewer medicines can be purchased and management is reduced. Program services decline.

For years the IHS and BIA have relied on a system called indirect cost rates to calculate indirect contract support for ISDA contracts. The indirect cost rate system, now set out in Office of Management and Budget (“OMB”) Circular A-87,<sup>2</sup> was developed by OMB to assist in tracking federal program dollars. It was never intended to be used as a means for calculating funding

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<sup>2</sup> Office of Management & Budget Circular A-87, *Cost Principles for State, Local, and Indian Tribal Governments*, 46 Fed. Reg. 9548 (Jan. 28, 1981). The current version of Circular A-87 will be set out in part 225 of the 2007 edition of C.F.R. The Circular and its Attachments A and E are reproduced at Docket No. 81, exhibit 7.

entitlements for federal programs. Virtually all tribes including Plaintiffs are compelled to use the system because the theoretical alternatives are completely impractical.

In 1997 the Tenth Circuit reversed summary judgment for the United States and its agencies and officials in a class action challenging the same system for calculating indirect cost entitlements for ISDA contracts. *Ramah Navajo Chapter v. Lujan*, 112 F. 3d 1455 (10<sup>th</sup> Cir. 1997)(“*RNC v. Lujan*”). The court held that the indirect cost rate methodology was employed by the defendants “effectively and knowingly” to reduce their payments to Indian tribes and organizations contracting for BIA programs under ISDA with the BIA. Plaintiffs were parties to the case by representation. Principles of collateral estoppel bar relitigation of issues presented in that case including those presented in the instant motion.

### **The Principal Defense**<sup>3</sup>

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<sup>3</sup> Plaintiffs have been hampered in responding to Defendants’ motion by their failure to supply a table of contents and a table of authorities to their 43-page brief. Rather than respond to every oblique suggestion of an argument in the brief, Plaintiffs are confining their opposition to the grounds for dismissal urged or subsumed in the major headings of, and the conclusion to, Defendants’ motion and developed by citation of authorities. *See* F.R.Civ.P. 7(b)(1)( motions “shall state with particularity the grounds therefor”); L.Cv.R.7 (“Each motion shall include or be accompanied by a statement of *the specific points of law and authority* that support the motion” (emphasis added).)

In particular, Defendants, without explanation of any kind, make passing reference to annual appropriations since 1998 for contract support costs stating these appropriation Acts do not provide sufficient funds for contract support costs, thus reducing the contract obligation. There is no development of this contention. The allusions are sufficiently distinct from the principal arguments offered by Defendants that Plaintiffs would be prejudiced by a decision based on those grounds; the failure to address them results in abandonment. The mere mention of an argument without development does not require response. *See., e.g., Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (declining to entertain asserted but unanalyzed claim); *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947) (points not urged in brief deemed abandoned); *Humble v. Boeing Co.*, 305 F.3d 1004 (9<sup>th</sup> Cir. 2002) (issues raised in “a brief but not supported

The principal defense presented in the instant motion under the rubric of waiver and acquiescence is that the Plaintiff signed away their rights to the statutory amount. This was the same defense presented in and decided against the IHS in *Appeals of Seldovia Village Tribe*, Interior Board of Contract Appeals, Nos. IBCA 3862 & 3863/97 (Oct. 20, 2003) (“*Seldovia*”) (attached as Exhibit 1). The Board rejected IHS’ argument that the tribe’s legal entitlement to contract support costs (“CSC”) could be limited to the amount recited in its Annual Funding Agreement (“AFA”):

. . . IHS maintains that Seldovia was bound by the funding scheme it had agreed to in its AFA . . . But [Seldovia] cites *MAPCO Alaska Petroleum, Inc. v. United States*, 27 Fed. Cl. 405 (1992), for the proposition that the Government cannot contractually force the Tribe to accept less than the full CSC’s when the Tribe is entitled to full CSC’s by law. It also asserts that the Government cannot lawfully benefit from a contract provision contrary to law, citing *Beta Systems, Inc. v. United States*, 838 F. 2d 1185. We agree.

*Id.* at 11.

Tellingly, although foreshadowing this *MAPCO* argument, *Defendants’ Memorandum in Support of Second Motion to Dismiss* (“*Def. Memo.*”) 33 n.10, Defendants do not alert the Court to *Seldovia* much less to its later history. IHS appealed to the Federal Circuit, but later abandoned the appeal. *Seldovia* had filed a motion for attorneys’ fees under the Equal Access to Justice Act, which, after *Cherokee* came down, was granted. See Exhibit 2, attached. These later events all took place after the cases relied on by Defendants, e.g., *Hermes Consolidated, Inc. v. United States*, 58

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by argument are deemed abandoned absent manifest injustice”); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 445 (5<sup>th</sup> Cir. 2000) (arguments not raised are deemed abandoned); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9<sup>th</sup> Cir. 1992)(issues raised in brief not supported by argument deemed abandoned unless manifestly unjust to do so). Moreover, the point lacks substantive merit. *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751 (2003); and see 19 Nash & Cibinc, Rep.29, “CHEROKEE NATION: MORE THAN MEETS THE EYE.”

Fed. Cl. 409 (2003), *reversed sub nom. Tesoro Haw. Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005), were decided.

Together, *Cherokee, RNC v. Lujan*, and *Seldovia* decide all issues presented in Defendants' motion in favor of Plaintiffs.

### **Posture**

In 2003, Defendants moved on mixed Rule 12(b)(1) and 12(b)(6) grounds to dismiss Plaintiffs' amended complaint for violations of ISDA contracts, asserting that Plaintiffs' claims were "both too early and too late".

The Court ruled in December 2003 (amended in minor respects a month later), dismissing claims prior to 1995 and after 2001, dismissing certain individual defendants, and dismissing claims founded in breach of trust and good faith, but refusing to dismiss the core claims for breach of contract for the years 1995-2001. The Court acknowledged the federal trust responsibility, *Amended Opinion on 1<sup>st</sup> Motion to Dismiss* (Docket No. 48) ("*Amd. Opinion*") 37-38, but dismissed because Congress was aware of shortfalls, the claim that IHS should have asked for more money was not redressable; and because the federal contract law precedents on which Plaintiffs relied did not involve ISDA contracts. *Id.* 38-40; *Opinion on Motion for Partial Reconsideration* (Docket No. 45) 3-7.

Thereafter the action was stayed pending resolution by the United States Supreme Court of two related cases presenting the issue of whether ISDA contracts are governed by ordinary federal contract law. Those cases were decided favorably to Plaintiffs and against the Government in *Cherokee v. Leavitt*, 543 U.S. 631, 125 S.Ct. 1172 (2005).

Despite the teachings of *Cherokee*, Defendants again move to dismiss on mixed Rule 12(b)(1) and 12(b)(6) grounds, reasserting their position that Plaintiffs' claims are both too early and too late, further contending that Plaintiffs "have yet to point to any term in any of their contracts that they allege was breached" and that Plaintiffs' claims are barred by equitable defenses of waiver and estoppel.

The first contention rests on a false distinction between the statute and the contracts. Under 25 U.S.C. § 4501(c), *Model Agreement* sec. 1(a)(1), the ISDA statute is expressly incorporated into each ISDA contract, thus obliterating any distinction between the two. A statutory ISDA breach is a contract breach. Relevant ISDA provisions were cited in the contract disputes. *See Defendants' 1<sup>st</sup> Motion to Dismiss* (Docket No. 13), Ex. B, at 4; Ex. C, at 2; and Ex. E, at 3.

The estoppel argument ignores that for 1995, 1996, and 1997, the lump sum years, neither Plaintiff could be charged with knowledge of the illegality of the rate-making system. *RNC v. Lujan* had not yet been decided. It is simply not true that Plaintiffs thereafter intentionally and knowingly waived their rights to adjustments in their rates; they accepted the old rate-based calculations only because they had to and any challenge would be futile. Challenge to their AFAs risked disastrous delays in obtaining whatever funding IHS proffered.

Concurrently with the Defendants' instant motion to dismiss, Plaintiffs filed a motion for partial declaratory summary judgment. These two motions and their memoranda overlap. The Court should consider them together. Plaintiffs' motion for summary judgment seeks a ruling as to the Government's liability on Plaintiffs' rate miscalculation claim for the so-called lump sum years (1995, 1996, and 1997). During those years, federal appropriations for health services to Indian

people were not restricted. *Cherokee* held that during those years, appropriations were legally available to pay contract support costs to the full extent of the Plaintiffs' contracts.

### **STATUTORY BACKGROUND**

The equitable defenses propounded in the name of the United States by its Department of Justice require a reminder of certain fundamentals, omitted from the statutory background given by Defendants, that weigh heavily on the balance of equities.

From its inception our nation made treaties whereby Indians ceded vast territories and reserved lesser territories in exchange for benefits promised by the United States. The legitimacy of our national land title derives ultimately from such treaties, and the obligations of the United States towards Indian tribes are a heavy trust responsibility. *See generally Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831) (first recognizing the trust relationship); *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049, 1054 (1942) (United States has charged itself with moral obligations of the highest responsibility and trust; its conduct in dealing with the Indians therefore judged by most exacting standards).

Public health responsibility to settled tribes was recognized as early as 1832. Act of May 5, 1832, 4 Stat. 514 (congressional funding of smallpox vaccinations for Indian tribes); and many treaties from and after 1855 specifically reference hospitals, physicians, and physicians' housing. *See, e.g.,* Treaty between the United States and the Yakama Nation of Indians, 12 Stat. 951 (1855) (U.S. to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair and provide with the necessary furniture, the building required for accommodation). *See also* United States' treaties at 12 Stat. 927,

929 (with the Dwamish, Suquamish, and other tribes); 12 Stat. 933, 935 (S'Klallam Indians); 12 Stat. 939, 941 (Makah Tribe); 12 Stat. 945, 947 (Walla-Walla, Cayuses, and Umatilla Tribes and Bands); 12 Stat. 957, 959 (Nez Percé Indians); 12 Stat. 963, 965 (Confederated Tribes and Bands in Middle Oregon); 12 Stat. 971, 973 (Qui-nai-elt and Quil-leh-ute Indians); 12 Stat. 975, 977 (Flathead, Kootenay, and Upper Pend d'Oreilles Indians); 15 Stat. 581, 585 (Kiowa and Comanche Tribes); 15 Stat. 649, 652 (Crow Tribe ); 15 Stat. 655, 658 (Northern Cheyenne and Northern Arapahoe Tribes); 15 Stat. 673, 676 (Eastern Band of Shoshonees and Bannack Tribe), collectively ceding large portions of the Pacific Northwest, the Rocky Mountains, and the Great Plains in return for the promise of the United States to provide, among other things, health facilities. Health care is one of the main responsibilities in the special government-to-government relationship between the United States and federally recognized tribes. U.S. Commission on Civil Rights, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 34 (2003).

The Snyder Act of 1921, 42 Stat. 208, 25 U.S.C. § 13, established the Indian Health Service to carry out the federal trust responsibility “for the relief of distress and conservation of Health” for Indian tribes, later transferred to the Department of Health, Education and Welfare (now Health and Human Services). Transfer Act of Aug. 5, 1954, 68 Stat. 674, codified at 42 U.S.C. § 2001.

Recognizing the profound failure of federal administration of trust responsibilities to Indian people, the Congress of the United States passed the Indian Self-Determination Act.<sup>4</sup> Congress considered a number of funding mechanisms and settled upon contracts as most binding and enforceable.<sup>5</sup> Subsequent judicial opinions and congressional history document the reluctance or inability of federal agencies to surrender administrative functions and funding. *See, e.g., Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1341-42 (D.C. Cir. 1996) (system for distributing inadequate contract support cost funding was arbitrary and failed to conform to ISDA purposes); *RNC v. Lujan*, 112 F.3d, at 1462-1463 (federal agencies consistently failed to fully fund tribal indirect costs); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Leavitt*, U.S.D.C. Ore. Civil No. 96-459 ST, Opinion and Order of Dec. 13, 2005 (reproduced at Docket No. 81, ex. 12), at 4 (ISDA's mandatory provisions were "added to overcome the Secretary [of Health & Human Service]'s bureaucratic recalcitrance, systematic violations of self-determination contractors' rights, and consistent failures over the years to administer self-determination contracts in conformity with the law" (internal editing omitted)).

After ten years of increasing resistance to ISDA by the IHS and BIA, Congress in 1988 passed comprehensive amendments, Public Law 100-472. These amendments created:

- A new category of mandatory funding for contract support costs, both indirect and

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<sup>4</sup> This Court has also held that "[t]he ISDA expressly acknowledges 'the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people [] . . . ' 25 U.S.C. § 450(a)(1). These words of the statute at a minimum imply the existence of a trust relationship between the United States and Indian people in those areas covered by the statute." *Amd. Opinion* 37.

<sup>5</sup> *See generally* Sen. Rept. No. 100-274 (1987).

direct, 25 U.S.C. § 450j-1(a)(2) through (5);

- A command that the Secretary “shall add” to each ISDA contract the “full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]”; and
- A remedial section conferring judicial power on this Court to enforce the provisions of ISDA contracts under the Contract Disputes Act, and giving the Court independent authority to award equitable relief, 25 U.S.C. § 450m-1.

In 1994, because of continuing stalling tactics of the IHS and BIA to thwart implementation of the new amendments, Congress enacted another broad set of amendments, Public Law 103-413.<sup>6</sup>

This time Congress inserted into ISDA:

- A prohibition on promulgation of new regulations except as specifically outlined in the Act, 25 U.S.C. § 450k(a)(1); and
- A Model Agreement which the agencies are required to use in every ISDA contract, 25 U.S.C. § 450l(c).

In turn the Model Agreement contains these provisions, among others:

- The United States is the contracting partner in every ISDA contract, *Model Agreement* §1(a)(1);
- The provisions of Title I of ISDA (25 U.S.C. §§ 450 *et seq.*) are incorporated into every ISDA contract, *id.*;
- The ISDA and any contract under it are to be liberally construed for the benefit of the contractor, *Model Agreement* §1(a)(2); and
- The funding amount of every ISDA contract “shall not be less than the applicable amount determined pursuant to [25 U.S.C. § 450j-1(a)].” *Model Agreement* §1(b)(4).

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<sup>6</sup> See generally Sen. Rept. No. 103-374 (1994).

Unhappily, Native Americans remain our most medically under-served population. U.S. Commission on Civil Rights, *BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM* (2004) (assigning as one cause of insufficient health care the refusal of IHS to provide full contract support costs to ISDA contractors and referencing, at 101-102, *Cherokee v. Leavitt* then pending in the Supreme Court).<sup>7</sup>

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.

*Seminole Nation*, 316 U.S. at 296-297. It is nothing short of outrageous that the Government in such context should ask this Court to excuse its contractual obligations on equitable grounds.

#### **STANDARD OF REVIEW FOR MOTION TO DISMISS**

All allegations of Plaintiffs' Second Amended Complaint are to be taken as true for purposes of the motion to dismiss. The court must construe the allegations of the complaint favorably to the pleader. *New Valley Corp. v. United States*, 119 F.3d 1576, 1579-1580 (Fed. Cir. 1997).

#### **ARGUMENT AND AUTHORITIES**

##### **I. SUMMARY OF ARGUMENT**

The Court has jurisdiction over subject matter pursuant to 25 U.S.C. § 450m-1(a). The Court lacks jurisdiction to entertain defenses that were not raised by the contracting officers in denying

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<sup>7</sup> The Commission report, citing statistics from the U.S. Department of Health & Human Services, notes that, in carrying out its obligation to American Indians, the Federal Government's *per capita* health care expenditures are far less than for federal prisoners. *Id.* at 95.

Plaintiffs' contract disputes. *Foley v. United States*, 26 Cl. Ct. 936, 941 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993).

Pursuant to Rule 12(g) of the Federal Rules of Civil Procedure, the Defendants may not in a second Motion to Dismiss raise a defense of failure to state a claim upon which relief may be founded. Nevertheless, the complaint states a claim upon which relief may be founded.

The ISDA contract, mandated by statute for the benefit of contracting tribes, incorporates each and every provision of the ISDA statute, such that a statutory violation is a contract breach. Statute and contract contain a rule of interpretation whereby each provision is to be interpreted favorably to the contractor. OMB A-87 by its own terms must be modified to comply with statute wherever inconsistent therewith.

In any event, *Cherokee v. Leavitt* and *RNC v. Lujan* are issue preclusive and *Seldovia* is controlling authority against the Defendants, comprehending all issues.

Waiver and estoppel do not apply to the Plaintiffs but do apply to the Defendants. A trustee raising equitable defenses against the beneficiary bears a heavy burden. *See infra*, at p. 33 n. 15. Mere signing of a contract does not in any case constitute waiver or consent especially for years before *RNC v. Lujan* was decided. Furthermore, Defendant is not permitted to forgo equitable defenses for years before presenting them under circumstances not permitted by rules of procedure. As trustee, Defendants had a duty to inform Plaintiffs on a timely basis if they thought a different procedure had to be followed to bring issues of damages and equitable relief to resolution on the merits. Defendants' arguments are dilatory, in bad faith, and in breach of trust.

Secretary Norton is a necessary party for equitable relief.

**II. THE GOVERNMENT IS BARRED FROM RAISING WAIVER OR ESTOPPEL.**

**A. The United States May Not Rely on Defenses Not Presented To the Contracting Officer.**

Among the Government's broadside arguments is the assertion that Plaintiffs acquiesced in Defendants' violations of the Indian Self-Determination Act and have consequently waived any right to redress of those violations or are estopped from asserting those rights. *See, e.g., Def. Memo.* 28, 36, 37. In fact, the record demonstrates no such acquiescence, waiver, or grounds for estoppel.<sup>8</sup> Even if it did, the Court does not have jurisdiction to address these arguments because they were not grounds for the decisions by the Contracting Officers. *See* Docket No. 13, exhibits D & F (Contracting Officers' decisions)

While this Court exercises *de novo* review over the decisions of the Contracting Officers, 41 U.S.C. § 609(a), the United States may not assert before this Court affirmative defenses that were not considered by the Contracting Officers.

To allow the government to assert alternate grounds in support of a contracting officer's decision, which were not the subject of that decision, would deprive contractors of the opportunity to choose the forum for that particular claim. Likewise, by failing to rely on these clauses at the contracting-officer stage, the government has circumvented one of the major purposes of the Act – encouraging settlement. *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 981-82 (1985) (discussing the contracting officer's obligation to attempt to negotiate a settlement). Accordingly, we conclude that this court lacks jurisdiction over the government's counterclaims and defenses . . . because they have not been the subject of final decisions by the contracting officer.

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<sup>8</sup> *See* Argument V, below, at 24 *et seq.*

*Foley v. United States*, 26 Cl. Ct. 936, 941 (Cl. Ct. 1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993). *See also* this Court's discussion of *Foley* in *Amd. Opinion* 14-15.

**B. The United States May Not Assert New Defenses That it Could Have Raised in its First Motion to Dismiss.**

The Government's motion does not comply with the Federal Rules of Civil Procedure including Rule 1: "... [These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." In presenting an omnibus preliminary attack that could have been presented three years ago, Defendants ignore this rule and prejudice Plaintiffs.

Rule 12(g) of the Federal Rules of Civil Procedure provides, in pertinent part:

If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Subdivision (h)(2) provides, again in pertinent part:

A defense of failure to state a claim upon which relief can be granted. . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

A motion to dismiss is not a pleading under Rule 7(a). The Government did not raise acquiescence, waiver, or estoppel in its first motion; it is thus precluded from raising *in a second motion to dismiss* new Rule 12(b)(6) affirmative defenses that it could have raised but did not raise in its first motion to dismiss. *Albany Insurance Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909-11 (5th Cir. 1993).

Rule 12(g) not only permits but expressly requires a party to join any motion made under Rule 12 with any other motion provided for in the rule and then available to the party, prohibiting any later motions to raise omitted defenses or objections.

2 Moore's Federal Practice ¶ 12.21, at 12-24 (3d ed. looseleaf 2005). See *Seretse-Khama v. Ashcroft*, 215 F.Supp.2d 37, 40 n. 8 (D.D.C. 2002).

The Court outlined what the United States could address in its supplemental motion to dismiss: whether there were appropriations available with which to satisfy a judgment against the United States, whether the Judgment Fund was available, and whether Plaintiffs had an agreement to use prior years' indirect cost rates for years after FY 1996. Transcript of Scheduling Conference, Dec. 10, 2003, at 3, 9.

The belated raising of equitable defenses under circumstances not permitted by rules of procedure is particularly troublesome in view of the United States' fiduciary responsibilities toward Plaintiffs. As trustee, if Defendants thought Plaintiffs had to pursue a different procedure, they had a duty to so inform them on a timely basis.

### **III. THE RATE-MAKING SYSTEM VIOLATES THE INDIAN SELF-DETERMINATION ACT.**

#### **A. A Central Purpose of the Indian Self-Determination Act is to Allow Tribes to Operate Their Own Health Programs by Contract Without Diminishing Program Services.**

Contrary to the express purpose of the 1988 amendment in Public Law 100-472, the A-87 system and its derivatives do not produce dollar amounts of contract support costs meeting the command of 25 U.S.C. § 450j-1(a)(2) and (3) and -1(g) to add full contract support costs to each

ISDA contract sufficient to operate the contracted program at the Secretarial level. *RNC v. Lujan*, 112 F.3d at 1463; *Second Amended Complaint* (Docket No. 11) ¶¶ 1-4, 14-25.

Congress amended the ISDA to address the failure of the BIA and the IHS to pay the indirect costs associated with ISDA contracts, explaining its intent as follows:

. . . Furthermore, . . . the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from direct program costs, which results in decreased amounts of funds for services.

Sen. Rept. No. 100-274, at 12. *See also id.* at 16, 30.

In 1994, Congress in Public Law 103-413, removed most of the agencies' rule-making authority, 25 U.S.C. § 450k, and re-emphasized that payment of full contract support costs is required to ensure delivery of the Secretarial program level of service:

Throughout this section the Committee's objective has been to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to tribal operation. In the absence of section 106(a)(2) as amended, a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.

S. Rept. No. 103-374, at 9.

In 1994, Congress also imposed a Model Agreement, commenting:

Section 1(b)(3) [codified as 25 U.S.C. § 450l *Model Agreement* sec. (1)(c)(1)(b)(4)]. . . provides that the Contractor shall receive no less than the Secretary would have provided for the operation of the program or portions thereof for the period covered by the contract, **plus funding for contract support needs.**

S. Rept. No. 103-374, at 11 (emphasis added).

In 1997, IHS told Congress:

The full funding of CSC is integral to tribes being able to assume the operation of IHS and other Federal programs. . . . The failure to adequately fund CSC inhibits the ability of tribes to develop the capability and expertise to manage services to their own people, and is directly responsible for inhibiting the number and scope of new tribal requests. **This is contrary to the policy of the Congress and the intent of the ISDA** . . . There is simply no incentive for tribal governments and organizations to assume IHS [programs] knowing they may have to reduce already under-funded health services.

See Docket No. 81 (*Plaintiffs' Memorandum in Support of Partial Summary Judgment* ("Pltfs' Memo."), exhibit 15 (IHS Report to Congress), at 4-5 (emphasis added). Despite this admission and the ruling in *RNC v. Lujan*, the IHS still resists the statutory command.

The Government argues that "the terms 'reasonable' and 'allowable,' are used in these funding provisions [25 U.S.C. § 450j-1(a)], are general terms" (emphasis by Government), suggesting that the Secretary has discretion in determining the amount of contract support costs to be added to the contract. *Def. Memo.* 22-23.

The Government is wrong. "Reasonable" and "allowable" are defined very carefully, even in the Government's own OMB Circular A-87.<sup>9</sup> If a cost is reasonable and allowable, the Secretary

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<sup>9</sup> "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. . . In determining reasonableness of a given cost, consideration shall be given to:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.
- b. The restraints or requirements imposed by such factors as: sound business practices; arms length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.
- c. Market prices for comparable goods or services.
- d. Whether the individuals concerned acted with prudence in the circumstances

must include it in the contract support cost amount. Conversely, if it is not reasonable or it is not allowable, it is not included in that amount. There is no discretion about it: if it meets the definition, it must be included; if it does not, it cannot be included.

There may be room for discussion about whether a particular cost is reasonable or is allowable. But that debate about a particular cost does not give the Secretary general discretion to deviate from the statutory command of adding to the contract amount

... contract support costs *which shall consist* of an amount for the *reasonable* costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which —

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

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

25 U.S.C. § 450j-1(a)(2) (emphasis added).

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considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.

e. Significant deviations from the established practices of the government unit which may unjustifiably increase the Federal award's cost.”

OMB Circular A-87, Att. A, ¶ C.2 (Docket 81, ex. 7, at 10-11). Allowable costs are defined with similar specificity (which includes the requirement that the costs be reasonable). *Id.* ¶ C.1 (Docket 81, ex. 7, at 9-10). Attachment B to Circular A-87 provides principles to be applied in establishing the allowability or unallowability of 42 specific categories of costs. 70 Fed. Reg. 51910, 51913-51922 (Aug. 31, 2005).

**B. The Tenth Circuit in *RNC v. Lujan* Ruled That the A-87 System Used by The United States Violates the Indian Self-Determination Act.**

Based on the wording of the 1988 amendments and their legislative history, the Tenth Circuit held in *RNC v. Lujan*:

....In applying the pre-amendment formula, defendants included in the direct cost base the funds plaintiff received from the United States Department of Justice (via the State of New Mexico) for criminal justice and juvenile offender restitution programs. Although inclusion of these 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. By including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.

112 F. 3d at 1463.

This is an exact summary of the basic facts pleaded in the Second Amended Complaint ¶¶ 1-4, 14-25. On this motion these facts must be accepted as true.

The Government had argued that Congress was “keenly aware” of the OMB indirect cost rate system and endorsed its continued use. The Court rejected the Government’s contention:

Defendants’ interpretation of the Act is unreasonable. Not only does its interpretation not benefit tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts. Contrary to the entire purpose of the Act, defendants’ interpretation of the indirect cost funding provision does nothing to “assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities,” or to “[enhance] the development and perception of Indian tribes as self-government entities.” S. Rep. No. 274, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1-2.

*RNC v. Lujan*, 112 F.3d at 1462. The A-87 rate-making system as used to determine ISDA indirect contract support entitlements has been indisputedly adjudicated to conflict with ISDA's commands regarding full funding and payment of indirect contract support costs.

**C. The Tenth Circuit's Decision in *RNC v. Lujan* Precludes Relitigation of the Rate Miscalculation Issue.**

The Tenth Circuit's compelling logic and analysis in *RNC v. Lujan* by themselves should persuade this Court that the IHS methodology violates the ISDA. But there is no need to relitigate this issue. The Government is collaterally estopped.

In *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575 (1984), the Government twice sued the same private chemical manufacturing company over the company's refusal to allow private contractors hired by the EPA to inspect its plants. The first suit involved a Stauffer plant in Wyoming. Stauffer successfully argued that the private contractor was not an "authorized representative" as that term is used in the Clean Air Act and thus was not empowered to inspect Stauffer's facility. *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981) (*Stauffer I*).

When EPA later tried to inspect a Stauffer plant in Tennessee through another private contractor, the same scenario unfolded. Stauffer challenged a civil contempt warrant obtained by the Government, asserting that EPA was collaterally estopped from relitigating the "authorized representative" issue already decided against the Government in *Stauffer I*. Because mutuality of parties and issues existed, the District Court in Tennessee agreed with Stauffer and barred the U.S. from relitigating the construction given to the requirements of the Clean Air Act. The Court of

Appeals for the Sixth Circuit affirmed based not on collateral estoppel but on its reading of the Clean Air Act. *United States v. Stauffer Chemical Co.*, 684 F.2d 1174 (6<sup>th</sup> Cir.1982) (*Stauffer II*). Judge Jones concurred in that result but on the ground that collateral estoppel barred relitigation of the issue because application of the doctrine would not contravene overriding public policy or result in manifest injustice. 684 F.2d at 1190-1192.

Affirming *Stauffer II*, and distinguishing its companion case, *United States v. Mendoza*, 464 U.S. 154, 169, 104 S. Ct. 568 (1984), on the ground that *Mendoza* lacked mutuality of parties, the Supreme Court adopted Judge Jones' view that "the doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." The Supreme Court held that the Government may not have more than the one full and fair opportunity to litigate a discrete issue against the same party.

By virtue of class membership in *RNC v. Lujan*, Tunica and RNSB were parties there by representation. Had the *Ramah* class lost, each Plaintiff would have been precluded from suing the IHS on the same claim. *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S.Ct. 2794 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."); *Western Coal Traffic League v. I.C.C.*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (member of national trade association barred from relitigating standard-setting rule-making of agency by issue preclusion). *Accord, National Classification Committee v. United States*, 765 F.2d 164 (9<sup>th</sup> Cir. 1985), citing *Montana v. United States*, 440 U.S. 147, 157-62, 99 S.Ct. 970 (1979) (judgment

predicated upon one set of contracts estopped litigation of legal issues in another case dealing with a similar, though unrelated set of contracts, because there had been no changes in facts or controlling law essential to the judgment); *Restatement (2d) of Judgments* § 41(1)(e)(1980).

Under ISDA, both the Secretary of the Interior and the Secretary of Health and Human Services “act as agents of the United States . . .” 25 U.S.C. § 450l( c), *Model Agreement* § 1(a)(1). That the Defendant Secretary here is HHS instead of Interior does not matter. The United States, not the agency or official sued, is the real party in interest when it comes to contract claims under ISDA.

The crucial point is whether or not in the earlier litigation the representatives of the United States had authority to represent its interests in a final adjudication of the issue in controversy.

*Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S.Ct. 907 (1940). *Accord*, *Mervin v. Federal Trade Commission*, 591 F.2d 821, 830 (D.C. Cir. 1978) (“[A] judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.”). *See also Elliott v. FDIC*, 305 F. Supp. 2d 79 (D.D.C. 2004), distinguishing issue preclusion from *res judicata* and applying issue preclusion to a case brought by a former federal employee whose termination was upheld in earlier litigation.<sup>10</sup>

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<sup>10</sup> In addition, IHS was involved in a nationwide task force of Indian tribes, organizations, and the BIA, which monitored the case including the settlement. *RNC v. Babbitt*, 50 F.Supp 2d at 1099. It was fully able to step in had it decided its interests were not adequately defended and was thus a de facto party. The IHS is Department of the Interior “related agency” for purposes of appropriations; *see, e.g.* H. Comm. on Apprs. Hrgs. 5-23-99, U.S. GPO 48-341-0.

The judgment in *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp. 2d 1091 (D.N.M. 1999), included the following Findings of Fact undergirding the miscalculation claim:

4. Indirect costs for ISDA contractors are generally fixed, not variable. Also, other federal agencies do not typically pay their fair share for indirect costs as determined by the OMB A-87 system. As a result of the inclusion of other federal agencies' programs in the base, the indirect cost rate is reduced. Under the OMB Circular A-87 system followed by the Defendants, the BIA then applied the rate to its portion of the direct base each year.

5. Because other federal agencies are under statutory or regulatory restrictions as to supplemental payment of indirect costs for administration of their programs, the result of the BIA system including the rate-making negotiation pursuant to the OMB A-87 Circular was to chronically underfund RNC and other Class members in terms of their reimbursement of indirect costs.

6. These underpayments or shortfalls had two elements: (1) given the fixed nature of indirect costs, the shortfalls produced less than full need for monies required by RNC and the Class members to operate BIA programs; and (2) the shortfalls produced less than the full need for monies to operate programs of other federal agencies "associated with" their ISDA contracts. *See* 25 U.S.C. § 450j-1(d)(2).

50 F. Supp. 2d at 1097.

The issues on the merits are complex. If not precluded, their adjudication will consume much court time and expense. If *RNC v. Lujan* were not given preclusive effect in the instant case and the Court reached the opposite conclusion about the legality of the rate system, not only would the will of Congress to fully reimburse ISDA contractors' administrative costs be thwarted, but the same statute with the same legislative history and purpose affecting virtually the same class will have been

contradictorily interpreted, one way for IHS and the opposite way for BIA. The law eschews such disharmony.<sup>11</sup>

As articulated in Judge Jones' concurrence in *Stauffer II*, 684 F.2d at 1190-92, public policy and manifest justice will be enhanced by application of collateral estoppel here.

**IV. EACH AND EVERY INDIAN SELF-DETERMINATION ACT CONTRACT INCORPORATES THE PROVISIONS OF THE ACT; A VIOLATION OF THE ACT WITH RESPECT TO A PARTICULAR CONTRACT IS A BREACH OF THAT CONTRACT.**

The Government argues that Plaintiffs did not present contract disputes to the Contracting Officers because Plaintiffs only alleged violations of the Indian Self-Determination Act rather than “duties and conditions contained within the four corners of their contracts.” *Def. Memo.* 20. But the requirements of the Indian Self-Determination Act are made part of every ISDA contract by the mandatory Model Agreement:

... The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) are incorporated in this agreement.

25 U.S.C. § 450l(c), *Model Agreement* §1(a)(1).

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<sup>11</sup> The meaning of a federal statute, administered by more than one federal agency, cannot change depending upon which agency is administering it. *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 613 (D.C. Cir. 1997), *followed in Al Fayed v. Central Intelligence Agency*, 254 F.3d 300, 306 (D.C. Cir. 2001); *Rapaport v. U.S. Department of the Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1073, 116 S.Ct. 775 (1996). *See also Public Citizen Health Group v. Food & Drug Administration*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) (different agencies adopting inconsistent interpretations of single federal statute would produce “an intolerable situation”). “Treating like cases alike is, we have said, ‘the most basic principle of jurisprudence.’” *Tax Analysts*, above, 117 F.3d at 614, *citing LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*).

This provision abolishes any distinction between the statute and the contract; all contract remedies may therefore be used to challenge a breach of the statute as well as the contract. “A construction of a contract provision which gives meaning to all its language is to be favored.” *Tecon Corp. v. United States*, 411 F.2d 1262, 1264 (Ct. Cl. 1969). The statutory language is part of the terms and conditions of the agreement just as if it were actually written into the contractual document. *See, e.g., Centex Corp.*, 395 F.3d 1283, 1292-1304 (Fed. Cir. 2005) (statutory rights at time of contract formation are incorporated).

**V. PLAINTIFFS DID NOT ACQUIESCE IN THE GOVERNMENT’S VIOLATIONS OF THE INDIAN SELF-DETERMINATION ACT.**

Waiver and acquiescence are equitable remedies to bar the courthouse door to plaintiffs who have sat on their rights and knowingly and intentionally waived them. In this case Defendants assert that waiver and acquiescence apply because Tunica and RSNB repeatedly “agreed” to AFA amounts below what they now claim.

But the Government equally agreed in the contracts to full payment of contract support costs. As discussed above, section 1(a)(1) of the Model Agreement, 25 U.S.C. § 450l(c), expressly incorporates the provisions of Title I of ISDA. Sections 450j-1(a)(2) and (g) of title 25, requiring full payment of contract support costs, are part of Title I of ISDA. Section 1(b)(4) of the Model Agreement likewise requires full payment of contract support costs.<sup>12</sup> Therefore, the obligation of

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<sup>12</sup> Model Agreement § 1(b)(4) in combination with § 450j-1(g) requires the Secretary to “add[] . . . to the [Secretarial] amount contract support” determined pursuant to section [450j-1(a)]. In turn, the amount to be added for contract support is “the amount for the reasonable costs which must be carried on” to fulfill the contract. As decided in *RNC v. Lujan*, the A-87-based amount does not correspond to this directive.

the United States to pay full contract support costs is incorporated into each and every one of Tunica's and RNSB's contracts.

The United States continuously and knowingly acquiesced in the inclusion of this obligation in each of those contracts, which it executed year after year. (Indeed, it enacted the legislation requiring the inclusion of these provisions.) The United States accepted the benefits of Tunica's and RNSB's performance of the Secretary's health-care obligations under those contracts year after year.

Under these circumstances, the law of waiver and estoppel *as argued by Defendants* would equally prevent the United States from presenting any claim that Tunica and RNSB are not entitled to full payment of contract support costs.

What is in fact presented is a conflict within the contracts. On the one hand, each contract includes a specific obligation of the United States to pay the statutorily-required full contract support costs. On the other, it includes a contract amount insufficient to pay those statutorily-required full contract support costs.

When there are conflicting provisions within a contract, the rules of construction set out in the contract itself govern: Each provision of ISDA and each provision of the contract "shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities and programs (or portions thereof) that are otherwise contractible under section 102(a) of such Act [25 U.S.C. § 450f(a)] including all related administrative functions from the Federal Government to the Contractor." 25 U.S.C. § 450l(c), *Model Agreement* sec. 1(a)(2). *See also id.*, *Model Agreement* sec. 1(d)(1)(A) (confirming trust responsibility of United States);

secs. 1(d)(1)(B), 2 (obligations of Secretary to act in good faith); *RNC v. Lujan*, 112 F.3d at 1461 (applying Indian canon of construction to resolve ambiguity in ISDA).<sup>13</sup>

Even were waiver or estoppel applicable, the agreements were forced on Plaintiffs by circumstances and in no way rose to the level of indifference, neglect, and knowledge required to apply the doctrines. “A party’s reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract should not ordinarily lead to a waiver of the innocent party’s rights.” 13 Williston on Contracts § 39.35, at 655 (4<sup>th</sup> ed. 2000). Acceptance of part payment of contract debt does not waive right to remainder.

**A. Contract Rights Created by Statute for the Benefit of the Contractor Cannot Be Waived.**

Plaintiffs’ rights to full payment of contract support costs are set out in ISDA. 25 U.S.C. § 450j-1(a)(2) and (g). Even if Plaintiffs had knowingly, intelligently, intentionally, and explicitly waived those rights – and they certainly did none of those things – that waiver could not stand. When Congress confers a right – in this case, through the ISDA – that right is conferred because it is in the public interest. To allow ISDA contractors to waive or bargain away their right to full payment of contract support costs is contrary to the public interest, as that would reduce the level of health services provided to Indians below the level at which the Secretary would have provided those services. Any such waiver is unenforceable. *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704-

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<sup>13</sup> Moreover, the rule of *contra preferentem* requires that any ambiguity be resolved against the drafting party. *Mastrobuona v. Shearson Lehman Hutton*, 514 U.S. 52, 60, 115 S. Ct. 1212 (1995).

05, 65 S.Ct. 895 (1945) (employees' written waiver of right to liquidated damages under Fair Labor Standards Act not enforceable).

[I]f government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence, or failure to protest. *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317, 192 Ct. Cl. 176, 183 (1970); *Rough Diamond Co. v. United States*, 351 F.2d 636, 639-43, 173 Ct. Cl. 15, 20-27 (1965), *cert. denied*, 383 U.S. 957, 86 S.Ct. 1221, 16 L. Ed.2d 300 (1966). In cases in which a breach of law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal. . . . Like the contractor in *Chris Berg, Inc.*, [the contractor] LaBarge may seek reformation of the price term, even after performance, if that term was allegedly diminished by unlawful government acts.

*LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995).<sup>14</sup>

The contracts here were contracts of adhesion and are subject to reform under the CDA. *New Valley Corp. v. United States*, 119 F.3d 1576, 1579-80 (Fed. Cir. 1997) (government contract contains implied covenant of good faith and fair dealing and government is under duty to advance reasonable contract expectations of contracting party; contract must be interpreted in a manner that

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<sup>14</sup> *Accord, Tompkins v. United Healthcare*, 203 F.3d 90, 98 (1<sup>st</sup> Cir. 2000) (party cannot waive application of preemption provisions of Employee Retirement Income Security Act); *Carter v. Exxon Co.*, 177 F.3d 197, 210 (3d Cir. 1999) (gas station franchisees cannot waive protections granted by federal Petroleum Marketing Practices Act); *Haghighi v. Russian American Broadcasting Co.*, 173 F.3d 1086 (8<sup>th</sup> Cir. 1999) (inclusion of statutorily-required language in settlement agreement cannot be waived; applying Minnesota law); *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510, 513 (Ind. Ct. App. 1<sup>st</sup> Dist. 1991) (employee in employment agreement cannot waive benefits of prevailing-wage statutes; "[a]llowing settlement or release of a claim would permit unscrupulous contractors to force employees to submit to economic pressures and accept lower wages"). See 15 Corbin on Contracts § 88.7, at 595 (rev. ed. 2003).

preserves its intent and does not destroy it; exculpatory clause drafted by the government must be strictly and narrowly construed; waiver applies only where government has used its best efforts to fulfill the reasonable expectations of the contractor).

Whenever the relationships between the parties appear to be of such a character as to render it certain that they do not deal on terms of equality . . . because of superior knowledge of the matter derived from a fiduciary relationship or from overmastering influence on the one side . . . the presumption is that the transaction is invalid.” 17A Am. Jur. 2d CONTRACTS, §237.

*LaBarge*, 46 F.3d at 1552.

The Government not only ignores the plain fact that ISDA is a remedial statute which contains specific commands to *include in each contract* full contract support costs needed to maintain program levels, 25 U.S.C. § 450j-1(a)(2) and (g), but it does so in the context of a trust responsibility and the prior class-wide adjudication of the same issue. *RNC v. Lujan*, 112 F.3d at 1463.

None of the cases cited by the Government, in particular *Hermes Consolidated, Inc. v. United States*, 58 Fed. Cl. 409 (2003), *reversed sub nom. Tesoro Haw. Corp. v. United States.*, 405 F.3d 1339 (Fed. Cir. 2005), involves any comparable statute making the contractor the beneficiary of the services it is to perform or involves a trust relationship. *See, e.g., LaBarge Products, Inc.*, 46 F.3d at 1552 (“However, if the government officials make a contract they are not authorized to make, in violation of **a law enacted for the contractor’s protection**, the contractor is not bound by estoppel, acquiescence or failure to protest”; emphasis added).

The Government places principal reliance on *Hermes Consolidated, Inc.* That decision dealt with a “sophisticated government contractor” which had successfully bid for a series of commercial profit-making contracts to supply military jet fuel over a six year period from 1988 to 1994. The contractor, Wyoming Refining Co., waited 14 years to go to court; presumably earned profits, *id.* at 413; and never complained about the price adjustment clause declared illegal by *MAPCO Alaska Petrol. Co. v. United States*, 27 Fed. Cl. 405 (1992). The court found that the clause in question was “promulgated for the mutual benefit of both the government and the contractor” and that “[w]hile characterized as ‘illegal’ or ‘unlawful’” it was better termed as “unauthorized”. *Hermes*, 58 Fed. Cl. at 419. On appeal, the Federal Circuit reversed the *Hermes* decision, overruling the *MAPCO* finding that the clause was illegal (but not *MAPCO*’s holding that a contract clause violating a statute cannot be waived). 405 F.3d at 1348-1349.

**B. IHS Was Well Aware of the Nationwide Protest Over Contract Support Costs Generally and the Rate System Specifically.**

The Ramah Navajos did not sit on their rights; they have been waging this war since the ISDA amendments were enacted. *See, e.g., Ramah Navajo School Board, Inc. v. Babbitt*, 87 F. 3d 1338 (D.C. Cir. 1996). It is, moreover, disingenuous for IHS to charge Plaintiffs with a knowing and intentional waiver of rights when in 2001 IHS said:

Full funding of tribal CSC has not been appropriated and has resulted in four congressional oversight hearings and litigation between several tribal governments and the IHS. . . .

U.S. Department of Health & Human Services, Indian Health Service Issue Summary: *Contract Support Costs* (2001) (attached as Exhibit 3). The litigation referred to includes *RNC v. Lujan*,

whose invalidation of the indirect cost rate system had sparked creation of the CSC work group referred to in Judge Hansen's findings on remand, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1099 (D.N.M. 1999). That work group included IHS.

**C. The Government Has Not Been Harmed By Delay; Federal Policy Commands Payment of Contract Support Cost Rate-Based Shortfalls.**

Unlike the Wyoming Refining Co. in *Hermes*, neither Plaintiff here has “run up damages” and then “suddenly go[ne] to court”. 58 Fed. Cl. at 413. The Government in the instant case did not rely on the contractor's acceptance of the dollar amount in choosing the low bidder, as it did in *Hermes* and the other defense procurement and timber-cutting cases cited by Defendants.

The *Hermes* court noted: “The [Government's] conduct indicates good faith in their attempt to abide by the court's decision in *MAPCO* while seeking conforming changes to the [Federal Acquisition Regulations].” *Id.* at 419. By contrast IHS did nothing to bring its practices into line with the law. In fact, it ignored the plain command of OMB Circular A-87:

The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. **This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate.** The agreed upon rates shall be made available to all Federal agencies for their use.

Docket No. 81, Attach. E, ¶E.3 (emphasis added). Given the nature of ISDA and this specific OMB language, no purposeful intent to waive rights to full contract support costs can be discerned and no proofs to the contrary have been proffered. Under A-87 it was the Government that had an affirmative duty to amend the indirect cost rate agreement following *RNC v. Lujan*. See, e.g.,

*Centex Corp.*, 395 F.3d at 1310-11 (waiver does not apply where agreement specifically reserves rights).

Neither Plaintiff has caused detrimental reliance since, as shown by *Cherokee*, 125 S.Ct. at 1180, if the Secretary has expended the entire appropriation, damages are recovered from the Judgment Fund. *See RNC v. Babbitt*, 50 F. Supp. 2d at 1095 (Judgment Fund payback of approved settlement under 41 U.S.C. § 612(c) would not be required; court would not allow reimbursement of \$76 million settlement to Judgment Fund from funds appropriated for current BIA programs: “Such a shell game would clearly be inequitable and the Court will retain jurisdiction to ensure that the Government does not engage in such charlatanism. . .”).<sup>15</sup>

The defense of waiver fails for the lump sum years (subject of Plaintiffs’ concurrent motion for partial summary judgment) for the simple reason the AFAs were all signed before Plaintiffs “knew” the rate-making system was illegal. *RNC v. Lujan*, 112 F. 3d 1455 (10<sup>th</sup> Cir.) was not handed down until May 8, 1997, well after the Plaintiffs signed their AFAs for those years.<sup>16</sup>

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<sup>15</sup> In any case, § 612 (c) does not require payback when funds to do so are “not available”. In that event the agency must seek additional appropriations. The word “available” is not defined. In a trust context where critical services such as health are involved, “available” must be construed in favor of Indians to exclude funds needed for on-going programs. In any case the payback provision is an internal government requirement which has been honored more by its breach than its fulfillment: “During fiscal years 2001, 2002, and 2003, federal agencies reimbursed Treasury for fewer than one of every five dollars owed under [the Contract Disputes Act].” U.S. General Accounting Office, JUDGMENT FUND: TREASURY’S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT 1 (GAO-04-481, April 2004). And see Defendants’ Amended Response to Interrogatory 10, attached as Exhibit 4.

<sup>16</sup> Tunica’s contracts were signed December 30, 1994 for Jan. 1, 1995 – Dec. 31, 1995 (Docket No. 13 (*Defendants’ 1<sup>st</sup> Motion to Dismiss*), Ex. I); Jan. 12, 1996, for Jan. 1, 1996 – Dec. 31, 1998 (*id.* Ex. J). AFAs were signed Jan. 12, 1996, for Jan. 1, 1996 – Dec. 31, 1996

Plaintiffs could not have knowingly and intentionally waived a right before the right was established. But the defense fails for all years. A-87 acts like the reservation of rights clause in *Centex*, at 1310-11.

The public policy declared by Congress in the ISDA by itself defeats the Government's argument:

**(a) Recognition of obligation of United States**

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

**(b) Declaration of commitment**

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as

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(*id.* Ex. J, at 22; repeated, *id.* Ex. N, at 1); and Dec. 3, 1996, for Jan. 1, 1997 – Dec. 31, 1997 (*id.* Ex. J, at 78; repeated, *id.* Ex. N, at 4). Indirect cost rate agreements were signed Dec. 30, 1994 (recited in *id.* Ex. I, at 32); Feb. 4, 1997 (recited in *id.* Ex. J, at 79) and March 5, 1997, for Jan. 1, 1995 – Dec. 1, 1996 (*id.* Ex. J, at 166). This last rate (54.78%) by agreement with the contracting officer was maintained through Sept. 30, 2002) (*id.* Ex. J., at 158, and *id.* Ex. K, at 20, 83).

RNSB signed an indefinite term contract Aug. 18, 1988 (*id.* Ex. L); Sept. 21, 1988 --Jan. 26, 1995 (Mod. #1-#38, including extensions through Dec. 31, 1995); May 31, 1991 (Mod. #12, *id.* Ex. L, at 63, granting mature contract status). AFAs were signed Aug. 21, 1995, for Jan. 1, 1995 – Dec. 31, 1995 (*id.* Ex. M, at 10; repeated at *id.* Ex. O, at 1); and Jan. 12, 1996, for Jan. 1, 1996 – Dec. 31, 1996 (*id.* Ex. O, at 12). See also Modification #3 of April 10, 1996, incorporating the 1996 AFA (*id.* Ex. M, at 24). The AFA for Jan. 1, 1997 --Dec. 31, 1997, is not yet in the record. Indirect cost rate agreements were signed Nov. 13, 1996, for Jan. 1, 1994 – Dec. 31, 1996 (Docket No. 81, exhibit 4, ex. 3); Dec. 21, 2004, for Jan. 1, 1995 – Dec. 31, 1997 (Docket No. 81, exhibit 4, ex. 1); and Oct. 21, 2005, for Jan. 1, 1998 – Dec. 31, 2002 (Docket No. 81, exhibit 4, ex. 2).

a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. . . The United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments. .

25 U.S.C. § 450a.

The idea that a trustee could avail itself of waiver and acquiescence under the circumstances presented here is antagonistic to the whole notion of an “obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities . . .”<sup>17</sup> ISDA is designed to enable Indian tribes to get out from under two paternalistic federal bureaucracies and chart their own course *without sacrificing program levels*.<sup>18</sup>

In any case *Seldovia* – decided almost contemporaneously with *Hermes* – settles the issue.

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<sup>17</sup> That continued use of an illegal system for determining the contract price is voidable by the beneficiary is firmly established. 76 Am. Jur. 2d, *Trusts*, § 322: “. . .[I]n all matters connected with the trust, a trustee may not, in dealing with the *cestui que* trust, gain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind, and where the transaction involves a breach of trust, it is voidable by the beneficiary.” This rule applies to the contracting officer’s failure to advise Plaintiffs of any duty of exhaustion or the adverse consequences of their actions in signing AFAs based on illegal rates: “The duty of the trustee is to make to the *cestui que* trust such full disclosure of all facts and circumstances which have come to his knowledge as trustee as to enable the *cestui que* trust to deal with him on even terms. It is his duty, indeed, to make the beneficiary understand the effect of the transaction.” *Id.* § 322. Defendants waited over three years to raise waiver or acquiescence. The argument and its presentation are unconscionable.

<sup>18</sup> Sen. Rept. No. 100-274, at 12, 16, 30 and Sen. Rept. No. 103-374, at 9.

Self-determination contractors cannot be held to contract terms which violate a law for their benefit.<sup>19</sup> Despite the fact that *Hermes* balanced the equities in the direction of the Government, the IBCA awarded Equal Access to Justice Act attorneys' fees to Seldovia. Had there been any reasonable question that Seldovia's signing of contracts for less money than it was entitled to barred the tribe from judicial relief, no EAJA fees could have been awarded.<sup>20</sup>

#### **VII. PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES.**

Neither the ISDA nor its contracts require that a contractor first avail itself of an administrative remedy attacking a statutory violation before challenging the Secretary's failure to fulfill the statutory commands in the contract. Since Plaintiffs' detailed their claimed statutory breaches as to the rate system in separate contract disputes, there is no question but that they complied with the Contract Disputes Act, 41 U.S.C. § 605. *Flying Horse v. United States*, 49 Fed. Cl. 419, 429-31 (Fed. Cl. 2001) (terminated BIA teachers who exhausted remedies under Contract Disputes Act not required also to exhaust administrative remedies through BIA or under Civil Services Reform Act; motion to dismiss denied).

The Government also urges that Plaintiffs should have challenged the rate-making system

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<sup>19</sup> Moreover, "a provision in a government contract that violates or conflicts with a federal statute is invalid or void." *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996).

<sup>20</sup> Under EAJA, 5 U.S.C. § 504(a)(1), the Government has the burden of proof to demonstrate that its position was "substantially justified". *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988). The award of fees under EAJA, *Application for Attorney fees of Seldovia Village Tribe*, Interior Board of Contract Appeals, Nos. IBCA 3862F/97 & 3863F/97, at 3-7 (July 26, 2005) (attached as Exhibit 2), demonstrates that the Government's position was not substantially justified.

directly through the APA or through the declination procedures, 25 U.S.C. § 450f(a)(2) and 25 CFR § 900.2, and that failure to exhaust constitutes a waiver of “any right to challenge the use or validity of these [indirect cost] rates.” *Def. Memo* 6, 28-29. But there was no declination process. The initiative for declining a contract rests with the Secretary, not the tribal contractor. *See* 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.2. Resort to this particular administrative process or to judicial review requires a governmental declination. 25 U.S.C. §§ 450f(b), 450m-1(a). An ISDA contractor does not have the power, or the right, to “decline” a contract. Nor is a contractor required to mount a challenge through an administrative process outside the Contract Disputes Act when the Secretary has already announced in two policy statements that he will not fully fund contract support costs. U.S. Department of Health & Human Services, Indian Self-Determination Policy Memorandum No. 92-02: *Contract Support Cost Policy* (Docket No. 81, exhibit 13); U.S. Department of Health & Human Services, Indian Health Service Circular No. 96-04: *Contract Support Costs* (Docket No. 81, exhibit 14). *See Seldovia*, at 6. The Government’s argument that failure to exhaust administrative remedies smacks of sharp practice. Exhaustion is excused where futility is apparent. *Honig v. Doe*, 484 U.S. 305, 326, 327, 108 S.Ct. 592 (1988). An agency charged with carrying out trust responsibilities of the United States should not be permitted to find a refuge in bureaucracy. *Flying Horse*, 49 Fed. Cl. at 428 (BIA allegation that plaintiffs sent contract dispute to wrong contracting officer was effort to find refuge in bureaucracy).

The Ramah Navajo Chapter commenced its odyssey towards relief from the incorrect rate system by proposing to the Office of Inspector General at Interior that its rate omit other federal agencies to the extent they do not reimburse indirect costs. OIG rejected the request. RNC agreed

to the rate produced the incorrect way and signed a contract with BIA incorporating it. After these two agreements, RNC filed a contract dispute under the Contract Disputes Act and when that was denied, filed suit. 112 F.3d at 1459. This is essentially the same procedure employed by Tunica and RNSB. Waiver, acquiescence, and estoppel could have been, but were not, interposed in the contractor officer's decision or in the lawsuit which followed. Collateral estoppel should apply to bar relitigation of this issue for the same reasons it does for the claim on the merits. *See* pp.18-22 above.

### **VIII. PLAINTIFFS' CLAIMS ARE RIPE.**

The only remaining jurisdictional defense relevant to this motion not yet decided by this Court or rendered moot by *Cherokee* is the contention that Tunica's and RNSB's claims for certain years are not ripe because Plaintiffs by agreement with the Government used rates set in prior years rather than obtain new rates.<sup>21</sup> The Government contends that until a given year's rate is reconciled the true extent of damage, if any, is not known. Yet it is clear the Plaintiffs received less contract support because of the built-in error of the system for calculating their entitlements and will receive less in future as well.<sup>22</sup> The Government claim is that uncertainty at this juncture as to the ultimate

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<sup>21</sup> RNSB has now received a new rate effective through FY 2002. Dkt. No. 81, exhibit 4. The new rate reconciles all of RNSB's claims through that year. RNSB has also exhausted remedies under the Contract Disputes Act for 1999 – 2003 and plans to file a motion to amend its complaint at an appropriate time.

<sup>22</sup> Claims for equitable relief are still pending in *RNC v. Norton*, on remand from the Tenth Circuit. While progress has been made in settling these claims, one complication is the absence of an adjudication that the IHS is also subject to the law established in that case and therefore subject to the same remedy. This is one reason why Defendant Secretary of Interior Gail Norton remains a necessary party to this case. Should relief requiring changes in the indirect cost rate system as administered for most ISDA contractors including Plaintiffs be awarded, she

exact amount of damage bars any recovery. But a party invoking federal jurisdiction need only satisfy the “irreducible constitutional minimum” of standing: injury-in-fact, causally linked to the alleged unlawful conduct, which is likely to be redressed by a favorable decision of the court. *Humane Society of the United States v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995) (per Silberman, J.), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). That minimum is met by showing present harm or reasonable certainty of future harm from Defendants’ actions or threatened actions. Keeping a thumb on the rate-making scale always hurts the contractor.

By virtue of incorrect indirect cost rates, whenever established, Plaintiffs received less monies for contract support costs than they would have received had the rates been computed in conformity with law.<sup>23</sup> Receiving less money than one is entitled to under a contract meets the *Humane Society* test. Plaintiffs’ rates were depressed by inclusion of other federal agencies’

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will have to implement those changes.

<sup>23</sup> Contrary to Defendants’ suggestion, *Def. Memo.* 27 n. 8, 25 U.S.C. § 450j-2 did not render the Tenth Circuit’s decision in *RNC v. Lujan* “no longer good law.” Section 450j-2 was added as a rider to the 1999 appropriations Act, Public Law 105-277, Div. A, § 101(e) [Title II], Oct. 21, 1998, 112 Stat. 2681-280. We have found no reference to § 450j-2 in the extensive legislative history of that law. A comment in H. Rept. No. 105-609, at 119, criticizes the settlement reached in *RNC v. Lujan*, but does not tie it to § 450j-2. The Senate did not comment on either the settlement or § 450j-2. On its face, the section’s meaning and intent are not clear; the phrases “directly attributable” and “associated with” lack precision and are not explained by legislative history, as there is none. For the years prior to fiscal 1999, the retroactive language would be an “impermissible repudiation” of contractual rights. *United States v. Winstar Corp.*, 518 U.S. 839, 924, 116 S. Ct. 2432 (1996) (Scalia, J., concurring). See also *Cherokee*, 125 S.Ct. at 1182; *Centex Corp.*, 395 F.3d at 1304-1306 (Government breached covenants of good faith and fair dealing by legislation retroactively depriving contractors of benefits of their contracts with Government); *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751, 777-782, 781 (2003) (appropriations rider targeting preexisting Government contract obligations to reduce outlays is impermissible breach of contract under *Winstar* for which Government is liable in damages).

programs, thus producing a lower recovery from the IHS than would have been the case without depression. As the U.S. District Court in New Mexico found, this systematic reduction in rates and resulting diminution of recoveries “produced less than full need for monies required by RNC and the Class members [who included both Plaintiffs] to operate the BIA [contracted] programs.” *RNC v. Babbitt*, 50 F.Supp.2d at 1097. This finding necessarily encompasses the identical procedure followed by IHS. Indeed, Plaintiffs Tunica and RNSB received their indirect cost rates from the same Interior agency as the Ramah Navajo Chapter did in the earlier case.

Additionally, unless corrected by this Court, Plaintiffs are harmed because the depression of rates carries ripple effects. The carry-forward procedure embedded in the common methodology uses the second preceding year’s rate as a starting point and adjusts for actual receipts and expenditures for the second preceding year. If the previous year’s rate is lower than it should have been, then under-recoveries in that previous year will be understated and over-recoveries will be overstated resulting in a lower rate in future years as well. *See* U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED, at 70 *et seq.* (GAO/RCED-99-150; June 1999) (Att. 2 to *Plaintiffs’ Motion to Certify Class*, Docket No. 21).

Since this present and future effect is foreseeable and mathematically determinable, the Court has power to declare the system illegal. This power makes this claim redressable and therefore justiciable. *Minebea Co. Ltd. v. Papst*, 229 F. Supp. 2d 1 (D.D.C. 2002) (future possibility of suit by customers enough to establish ripeness for declaratory judgment purposes in pre-emptive patent infringement dispute); *Jeanette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090, 1093

(D.C. Cir. 1969) (pre-enforcement declaratory review of constitutionality of new statute barring demonstrations and assemblies on Capitol grounds ripe for review).

Defendants are simply mistaken in their assertion that precise determination of damage must exist for ripeness. *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Dev. Comm.*, 461 U.S.190, 201, 103 S.Ct. 1713 (1983) (challenge by utilities to new state statute requiring disposal facilities for hazardous wastes filed prior to submission of applications for permits to build facilities and prior to denial of permits; held: “One does not have to await the consummation of threatened injury to obtain preventive relief.”); *Thomas v. Union Carbide Agr. Prods.*, 473 U.S. 568, 580, 105 S.Ct. 3325 (1985) (constitutionality of binding arbitration required by regulatory statute challenged prior to arbitration; held: “hardship to the parties of withholding court consideration must inform any analysis of ripeness”); *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992) (“Of course, a plaintiff need not suffer a completed harm to establish adversity of interest between the parties”). Here the hardship to the parties from the continuation of the now-adjudicated illegal rate-making system is manifest and the absence of adjudication against IHS as to the rate system causes continuing uncertainty and confusion.

A system of calculation employing a fictitious assumption to decrease a statutorily-created contractual entitlement is patently injurious. The A-87 system is the butcher’s thumb on the ISDA scale.

This is hardly an abstract, theoretical dispute. Real people’s lives are impacted daily by inadequate Indian health care. Defendants’ illegal rate calculation is a fact. It is actionable. It is cognizable by this Court.

**VII. THE SECRETARY OF THE INTERIOR IS A NECESSARY PARTY FOR EQUITABLE RELIEF.**

Plaintiffs in this action allege the methods used by Defendants for calculating indirect cost rates violate the Indian Self-Determination Act. *Second Amended Complaint* (Docket No. 11) ¶¶ 1-4, 14-25. Among other relief, Plaintiffs ask the Court to declare the methods employed by the Defendants for computing and paying entitlements to indirect contract support costs “to be in violation of the governing statutes and in breach of contract and issue an injunction accordingly.” *Id.* ¶ 1 and prayer ¶ C.

The National Business Center is the entity that calculates indirect cost rates, as successor to the Office of the Inspector General of the Department of the Interior. The National Business Center is also part of the Department of the Interior. Secretary Norton is, of course, the executive head of that Department.<sup>24</sup> *Id.* ¶¶ 12, 13-B.

Plaintiffs further allege that, despite judicial determination that its methods violate the Indian Self-Determination Act, the National Business Center continues to use those methods. *Id.* ¶¶ 2-4.

In the absence of the Secretary of the Interior, this Court cannot provide complete relief, since the other remaining individual Defendant, the Secretary of Health and Human Services, cannot order the National Business Center to conform its method of computing contractor entitlement to indirect

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<sup>24</sup> When this Court dismissed defendants Grim, Devaney, and Vigotsky from this action, it recognized that the Secretaries, who act as agents on behalf of the United States, are appropriately before the Court, while those named defendants are merely agents of the Secretaries. *Amd. Opinion* 36-37.

costs to the requirements of ISDA. *See* 28 U.S.C. § 1361; F.R.Civ.P. 19(a). ISDA specifically authorizes injunctive relief against the Secretary to correct violations of the Act:

[T]he district courts may order appropriate relief including . . . injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder . . .

25 U.S.C. § 450m-1(a).

Secretary Norton's presence in this action is necessary to afford the injunctive relief requested.

The principles of necessary and permissive joinder are set forth in F.R.Civ.P. 19 and 20. The Government has not referred to either of these rules in seeking to dismiss Secretary Norton, whom the Court has retained in the case as a party-defendant after being shown proof that she was served. *Minute Order* (Docket No. 59) granting *Unopposed Motion to Correct* (Docket No. 54). As a result the motion fails for the simple reason that none of the elements necessary under those rules has been set forth in the motion: prejudice, expense, or delay. *See* 7 Wright, Miller & Kane, *Federal Practice & Procedure*, Civil § 1652, at 396 (3d ed. 2001).

Instead, Defendants rehash the waiver-acquiescence and ripeness arguments previously addressed. *See* pp.24-34, above. Our response answers the only arguments made for dismissal of the Interior Secretary. A fair reading of the complaint shows that the two agencies, HHS and Interior, have together persisted in employing a defective rate making system to calculate the § 450j-

1(a)(2) amount of indirect contract support costs to be added under § 450j-1(g) and *Model Agreement* § 1(b)(4) to each Annual Funding Agreement.

The contention that other options exist which might ameliorate the use of fixed with carryforward methods is a chimera designed by the Government to confuse and obfuscate. The actual practicalities do not lend themselves to any of the avenues suggested, as trial of this cause will show. Provisional/final rates force the contractor to pay back monies already spent if they are found to be owed the Government at the end of the fiscal year. Multiple rates are too unwieldy and complicated for most small (or even large) contractors to use. Lump sum agreements are subject to contracting officers' whim and delay.

The fixed with carryforward procedure would be an acceptable means to determine the § 450j-1(a)(2) amount for indirect contract support costs *if* the rate calculation omitted those other federal agency programs which do not reimburse indirect costs or do so at woefully low rates. To correct this feature of the system, Secretary Norton is a necessary party under Rule 20. *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1855) (those who would be joined include "persons having an interest in the controversy, and who sought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy and do complete justice, by adjusting all the rights involved in it.) *Shields* is cited with approval in 7 Wright, Miller & Kane, Federal Practice & Procedure, Civil § 1604, at 39 (3d ed. 2001).

### CONCLUSION

The IHS has continued to employ the mechanism found in *RNC v. Lujan* to illegally shortchange Plaintiffs when it was employed by the BIA. This Court has jurisdiction and Plaintiffs are entitled to damages and equitable relief. Defendants who participated in ancillary proceedings were well aware of *RNC v. Lujan* and should have changed the system when it was declared illegal. They are not entitled to equitable defenses. Secretary Norton is necessary for complete relief.

This Court should deny Defendants' second motion to dismiss in its entirety and enter an order allowing Plaintiffs to re-file their motion to certify class under Rule 23 F.R.Civ.P. Plaintiffs respectfully ask the Court to set this motion and response for oral argument.

Respectfully Submitted:

M.P. GROSS & ASSOCIATES, P.C.

By /s/ Michael P. Gross

MICHAEL P. GROSS

Counsel for Plaintiffs

460 St. Michael's Drive, Suite 401

Santa Fe, New Mexico 87505

Telephone: (505) 995-8066

Fax: (505) 989-1096

New Mexico Bar No. 1027

J. E. GALLEGOS

GALLEGOS LAW FIRM, P.C.

Co-Counsel for Plaintiffs

460 St. Michael's Drive, Bldg. 300

Santa Fe, New Mexico 87505

Telephone: (505) 983-6686

Fax: (505) 986-1367

New Mexico Bar No. 897

DANIEL H. MACMEEKIN  
DAN MACMEEKIN, ATTORNEY AT LAW  
Co-Counsel for Plaintiffs  
1776 Massachusetts Avenue, NW, Suite 801  
Washington, DC 20036  
Telephone: (202) 223-1717  
Fax: (202) 223-1459  
D.C. Bar No. 393035

ERIC TREISMAN  
Co-Counsel for Plaintiffs  
Post Office Box 2897  
Santa Fe, New Mexico 87505  
Telephone: (505) 988-9750  
Fax: (505) 986-8305  
New Mexico Bar No. 2744

DONALD JUNEAU  
Co-Counsel for Plaintiffs  
Post Office Box 1857  
Hammond, Louisiana 70404  
Telephone: (985) 429-0830  
Fax: (985) 542-0046  
Louisiana Bar No. 7593