

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

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO 'LUMP SUM YEARS' (1995-1997)**

INTRODUCTION AND SUMMARY OF ARGUMENTS

Plaintiffs have moved for partial summary judgment in this putative class action. They assert that the Secretary of Health and Human Services (HHS) has violated the Indian Self Determination Act (ISDA) in Indian Health Service (IHS) self-determination contracts. The crux of plaintiffs' argument is that OMB Circular A-87, a method elected by Plaintiffs for calculating indirect contract support costs (CSC) in their IHS contracts, violates the ISDA. Under Plaintiffs' theory, IHS is required to pay not only for the indirect costs of running IHS programs, but must foot the bill for non-IHS programs as well. Underscoring the inequity of the relief Plaintiffs seek is the fact that IHS programs typically comprise less than half of a given tribal contractor's portfolio of programs. If the Court ruled as Plaintiffs desire, tribal contractors could assume 90% non-IHS contracts, but shift the entirety of the indirect costs associated with those contracts to IHS. Shifting costs from one agency to another is antithetical to appropriations law, but the logic of Plaintiffs' argument would accomplish precisely that perverse outcome.

With this motion, Plaintiffs hope to evade scrutiny of the dubious merits of their contention that "the IHS methodology violates the ISDA" by invoking the judicial doctrine of collateral estoppel or issue preclusion. Specifically, Plaintiffs rely upon a Tenth Circuit decision involving a different contracting agency: the Department of the Interior (Interior or DOI). That case concerned ISDA contracts with the Bureau of Indian Affairs (BIA), a component of Interior. The BIA contracts at stake in that litigation were funded by Interior's appropriations, formed under Interior's regulations and contracting policies, and involved Interior's programs.

Contrary to Plaintiffs' assertions, HHS neither stands in privity with Interior, nor is HHS bound based on Plaintiffs' characterization of the United States as "the real party in interest." Neither HHS nor IHS was a named defendant in the BIA contract litigation. Plaintiffs did not challenge

HHS's contracts, appropriations, regulations, contracting policies, or programs in that court. Plaintiffs' efforts to inflate the HHS role in the BIA contract litigation relies upon language in the BIA contractor settlement agreement – language that only serves to defeat Plaintiffs' argument. The plain language of the settlement agreement, applicable against the Plaintiffs, demonstrates that HHS was not a defendant *sub silentio* in the BIA litigation. Accordingly, Plaintiffs have failed to satisfy the requirements of collateral estoppel.

Even if this Court were to agree that the preconditions for collateral estoppel have been met, this Court should nevertheless exercise its discretion and decline to apply the doctrine (i) because under these circumstances application of the doctrine would effectively “freeze the law,” and (ii) the well-established exception for a change in the legal atmosphere applies. Since the Tenth Circuit's ruling, the legal landscape surrounding Plaintiffs' claim for additional indirect CSC has changed both legislatively and judicially, triggering the relevant exception to collateral estoppel. Specifically, reacting to the Tenth Circuit's ruling, Congress promptly amended the ISDA to forbid the kind of cost shifting endorsed by that court's opinion.

Finally, even if this Court were to apply collateral estoppel, this case is far from over. The Supreme Court recently rendered a decision unanimously clarifying that the promises in ISDA contracts are enforceable like the promises in ordinary procurement contracts. Thus, even if this Court precludes HHS from litigating whether IHS's use of Office of Management and Budget Circular A-87 (OMB A-87) indirect contract support cost (CSC) rates complies with the ISDA, HHS would nonetheless remain entitled to argue the full panoply of contract defenses. Contrary to Plaintiffs' assertions about IHS policy, IHS has long permitted tribal contractors a variety of options for the determination of indirect costs in IHS's ISDA contracts. Indeed, a number of tribal contractors elect to negotiate lump sum payments from IHS directly, or to take advantage of different

kinds of rates available under the OMB A-87 methodology. Plaintiffs, however, chose to agree to the indirect cost rates they now challenge here. IHS is bound by its promises in ISDA contracts; like IHS, Plaintiffs too are bound by their own promises, including their agreements to a set amount of indirect CSC.

Also pending before this Court is Defendants' renewed motion to dismiss, filed January 13, 2006, (docketed as #82), which Plaintiffs opposed on March 23, 2006, (docketed as #89). Defendants' reply has been filed concurrently with this opposition. Defendants' renewed motion to dismiss is now fully briefed, ready for adjudication, and may dispose of this case entirely.¹

STATUTORY BACKGROUND

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

ISDA Contract Formation. Under the ISDA, if a tribe or tribal organization wishes to take over the planning, conduct, or administration of programs or services which are otherwise provided by IHS or BIA, it may submit a request to the Secretary in the form of a self-determination contract

¹ The jurisdictional arguments raised in Plaintiffs' motion at pages 25-29 are fully addressed in Defendants' renewed motion to dismiss (Dkt. #81) and are thus not repeated here.

proposal. See 25 U.S.C. § 450f(a)(2). The proposal must contain, inter alia, the amount of funding requested for the contract. See 25 C.F.R. § 900.8(h). Funding under an ISDA contract includes two components—the Secretarial amount and CSC (CSC). See 25 U.S.C. § 450j-1(a). At issue in this case are indirect CSC, which are administrative costs that are shared by several different programs or services, such as accountants or shared facilities. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). Because these funding provisions do not include a specific amount or a specific formula for determining the necessary and appropriate funding levels for any particular contract, the tribe or tribal organization must negotiate with the contracting agency (in this case, IHS) both the terms of the contract and the levels of funding by submitting a proposal. See 25 C.F.R. § 900.8(h). If the parties cannot reach an agreement on either the terms or the funding levels in the contract, the ISDA provides a comprehensive dispute resolution process, culminating in a “declination” action in federal court. See 25 U.S.C. §§ 450f(a)(2), (4); 25 C.F.R. §§ 900.16, 900.18.

Declination of Contract Proposals. The Secretary may decline a contract proposal on one of five statutory bases. See 25 U.S.C. § 450f(a)(2); see also 25 C.F.R. § 900.22. Once the Secretary issues a declination, the tribal contractor may invoke an administrative review process or go directly to federal court. 25 U.S.C. § 450(f)b. Section 450m-1(a) of the ISDA gives federal courts the power to review a Secretary’s declination decision for its compliance with ISDA and, if the decision is in error, to enjoin the Secretary “to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract.” Id. § 450m-1(a). The conclusion of a declination action is either an order affirming the decision of the Secretary or an order compelling the Secretary to enter into a contract. As a result, an ISDA contract is formed if either (1) the parties are in agreement about the terms of the contract and the Secretary awards the contract, or (2) a reviewing court orders the Secretary to award the contract under the terms requested by the tribal

contractor.

The ISDA Contract. Each ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1995, annual funding agreements (AFA).² The funding levels for an ISDA contract are generally described in the AFA.

Contract Disputes. Once the parties execute an ISDA contract and AFA, all disputes arising under it are subject to the Contract Disputes Act (CDA). See 25 U.S.C. §§ 450m-1(a), (d). The CDA is found at 41 U.S.C. §§ 601 et seq., and requires, inter alia, that before a claim may be brought in federal court, it must first be timely presented to a contracting officer at the relevant agency. Tribal contractors are also permitted, by statute and contract, to retrocede (a process where the ISDA contractor effectively returns the program to IHS control), or to suspend the program after notice to the Secretary, if the contractor believes that it lacked sufficient funding to run a program under contract. See 25 U.S.C. §§ 450l(c)(b)(5), 450j(e)

Calculating Indirect Costs. While the ISDA defines indirect CSC and provides that indirect CSC shall be added to the contract pursuant to an annual funding agreement, it does not specify or mandate how the parties will ascertain the amount of indirect cost funding. Although some tribal contractors negotiate indirect costs directly with IHS or BIA and others do not incur indirect costs at all, many tribal contractors use an indirect cost rate (or rates) as a basis for calculating their indirect costs. However, IHS does not require its ISDA contractors to negotiate indirect cost rates as a basis for payment of indirect costs. Declaration of Veronica Zuni, at ¶ 27 (attached as Defs. Ex. BB);³ Declaration of Ralph W. Ketcher at ¶ 35 (attached as Defs. Ex. CC). If a contractor does not

² See 25 U.S.C. § 450l; id. § 450l(c)(e)(2); id. §§ 450l(c)(b)(4), (c)(f)(2).

³ With respect to Defendants' Exhibits, this Memorandum references Exhibits A-NN. 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

have an indirect cost rate, IHS and the contractor will negotiate an amount of indirect CSC funding to be awarded to that contractor. Id.

Indirect cost rates are not issued by IHS or BIA. They are the result of a negotiation-- independent and separate from contracting under the ISDA--between a government contractor and its "cognizant agency." See 2 C.F.R. Pt. 225, App. A, § A.6. Interior is the cognizant agency for tribal governments. See id. App. E, § D.1.c. DOI is Tunica and Ramah's cognizant agency. See (1st) Declaration of Deborah A. Moberly ¶ 3 (dkt. 82, Ex. AA). Since January 3, 2003, the agency within DOI responsible for rate negotiation has been the National Business Center (NBC). 1st Moberly Dec. ¶ 3. Prior to that time, this function was handled by DOI's Office of the Inspector General (OIG). 1st Moberly Dec. ¶ 3.

The indirect cost rate negotiation is guided by general cost principles set forth in circulars developed by the Office of Management and Budget, OMB A-21 (for educational organizations), OMB A-87 (for state, local, and tribal governments), and OMB A-122 (for nonprofit organizations), which are published in the Code of Federal Regulations. See generally Arizona v. Thompson, 281 F.3d 248, 144 (D.C. Cir. 2002); Alabama v. Shalala, 124 F. Supp. 2d 1250, 1253 (M.D. Ala. 2000). As this action involves tribal governments, the relevant circular is OMB-87. OMB A-87 provides guidance on the reasonableness, allowability, and allocability of indirect costs. See id. It aims to equitably allocate indirect costs to programs (federal, state, private, and/or tribal) that benefit from shared administrative costs. See id.; 2d Declaration of Deborah A. Moberly at ¶ 9 (attached as Ex. DD). OMB A-87's function, along with the Circulars providing general cost principles for other,

#17. Defendants filed Exhibit AA in support of Defendants' (Renewed) Motion to Dismiss (docketed as #82) on January 13, 2006. Defendants have not re-filed these exhibits, but have provided courtesy copies to Chambers and Plaintiffs' counsel. Defendants have filed the remaining exhibits BB-NN in support of this opposition to Plaintiffs' motion for partial summary judgment, and in support of Defendants' anticipated motion for summary judgment.

non-tribal government contractors, is to ensure that the programs benefitting from indirect costs are allocated their fair share of indirect costs, but also to ensure that no federal program is allocated more than its fair share of costs. 2d Moberly Dec. ¶¶ 6, 9. OMB A-87 is not intended “to identify the circumstances or dictate the extent of Federal and [contractor] participation in the financing of a particular program or project.” 2 C.F.R. Pt. 225, App. A, § A.1; see also Maine v. Shalala, 81 F. Supp. 2d 91, 96 n.4 (D. Me. 1999) (noting that provisions of law explicitly supercede general cost principles in circulars).

While an indirect cost rate may or may not be used as a basis for the actual reimbursement or award of indirect costs, the negotiation of such a rate does not itself authorize the award of indirect costs, or otherwise establish the total indirect costs required by any contract’s funding agency. 2d Moberly Dec. ¶ 44. 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. Id. The cognizant agency is not involved with the funding of contracts or grants once the rates are issued. Id. ¶ 45. How any particular federal agency uses the indirect cost rates in its decision to provide indirect costs to a contractor is separate and apart from the cognizant agency’s rate negotiation responsibility. Id.

Application of OMB A-87 to a contractor’s unique circumstances yields an indirect cost rate or rates, that may then be used as permitted under any of the contractor’s contracts or grants. Id. ¶ 11. 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”). Id. ¶ 12. The ratio yields an indirect cost rate (indirect cost pool / direct cost base). See 2 C.F.R. Pt. 225, App. E, § B.2; 2d Moberly Dec. ¶ 12. There are many other methodologies and rate types available under the Circular, including multiple “special”

rates, “fixed with carry-forward rates,” predetermined rates, or provisional rates.⁴ 2d Moberly Dec. ¶¶ 17, 18, 25, 28, 29. The goal of the Circular is to equitably allocate indirect costs to programs that benefit from them. Id. ¶ 9.

FACTUAL AND PROCEDURAL BACKGROUND OF THIS ACTION

The Plaintiffs. Tunica-Biloxi Tribe of Louisiana (Tunica) is a federally-recognized Tribe located in the State of Louisiana. (2d Am. Compl. ¶ 8.) Since before 1995, Tunica has had a self-determination contract with the Secretary to run a comprehensive health service program for its members. (2d Am. Compl. ¶ 8.) Tunica’s contracts at issue in this case cover fiscal years 1995-2001.⁵ Tunica negotiated and signed fixed-with-carry-forward indirect cost rate agreements for the years 1995 (53.23%) and 1996 (54.78%). 1st Moberly Dec. ¶ 4. Tunica has not obtained an indirect cost rate for any year after 1996. 1st Moberly Dec. ¶ 6.

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

⁴ Contractors may negotiate more than one rate, called either the multiple allocation base method or “special” rates. 2d Moberly Dec. ¶ 29. Multiple rates are available to government contractors when indirect costs benefit the contractor’s programs in varying degrees, such as when a program in the contractor’s base benefits from the indirect costs to a greater degree than the other programs. Id. The purpose of allowing contractors to have multiple rates is to allocate indirect costs to programs relative to the benefits received by those program. Id.

⁵ A 1995 Contract (Ex. I), a 1996 Contract in effect until 2000, with accompanying annual funding agreements, (Ex. J), and a 2000 Contract, in effect throughout 2001, with accompanying annual funding agreements, (Ex. K).

(17.04%), 2003 (15.55%), and 2004 (17.5%). 1st Moberly Dec. ¶ 8; 2d Moberly Dec. ¶ 40.

The Plaintiffs' CDA Claims. On April 2, 2001, and September 27, 2001, Tunica submitted contract dispute claims to IHS in the amount of \$309,008 related to their contracts and AFAs in effect between 1995 and 2001. (Ex. B, C.) Tunica raised three legal theories to support its claim for additional indirect CSC funds. On August 31, 2001, RNSB submitted contract dispute claims to the IHS in the amount of \$442,998 related to their contracts in effect between 1993-1996. (Ex. E.) IHS denied Tunica's CDA claims on May 3, 2002. (Ex. D.) IHS denied RNSB's CDA claims on December 18, 2001. (Ex. F.) This lawsuit followed.

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

The First and Second Claims for Relief allege breach of contract, but divide the claims into separate categories: claims for funding in years prior to fiscal year 1998, and claims for funding in 1998 and years thereafter. (2d Am. Compl. ¶¶ 34-41.) The Third Claim for Relief alleges breach of trust. (2d Am. Compl. ¶¶ 42-46.)

This Court's Order of January 22, 2004. On March 31, 2003, Defendants filed a Motion to Dismiss the Second Amended Complaint (docketed as #13). In a Memorandum Opinion of

December 9, 2003, amended January 22, 2004, the Court dismissed parts of the First and Second Claims for Relief and all of the Third Claim for Relief (docketed at #48). All that remained to be adjudicated were Tunica's claims related to fiscal year 1995-2001 funding (covering parts of the First and Second Claim for Relief), and RNSB's claims related to fiscal year 1995 and 1996 funding (covering parts of the First Claim for Relief only). (Opin. at 15, nn.13, 17.) All other claims related to the Secretary's alleged duty to request additional appropriations for CSC (couched as breach of contract in the First and Second Claims for Relief, and as breach of trust in the Third Claim for Relief) were dismissed. (Opin. at 37-40.) Upon reconsideration of the dismissal of all claims related to the Secretary's duty to request additional appropriations, the Court reaffirmed its prior holdings. See Jan. 22, 2004 Opin. (docketed as #45.).

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

Cherokee Nation v. United States. In Cherokee Nation, the Supreme Court first had to determine the nature of an ISDA contract. See 543 U.S. 631, 638-39, 125 S. Ct. 1172, 1178-79 (2005). The government had argued that an ISDA contract is not a contractually binding agreement, but a unique, government-to-government agreement to which general contract law did not apply. See id. at 638, 125 S. Ct. at 1178. Rejecting this argument, the Court held that the promises in ISDA contracts are enforceable like any other procurement contract in which the government is bound by its promises. See id. Next, the Court had to assess a defense raised by the Secretary to the specific contracts at issue in that case, e.g., that the Secretary did not have sufficient appropriations to pay the amounts promised in the plaintiffs' contracts. See id. at 640-45, 125 S. Ct. at 1179-81. It was undisputed that the Secretary had failed to pay the funding amounts in the two Cherokee plaintiffs'

contracts. See id. at 636, 125 S. Ct. at 1177 (“The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay.”). In these circumstances, the Court held that (1) when the Secretary promised a specific amount in an ISDA contract for indirect CSC, and (2) when appropriations were legally available for that purpose, the Secretary could not defend against a breach of contract action by arguing that it had insufficient appropriations. See id. at 641-45, 125 S. Ct. at 1178-81. Moreover, the Court held that when Congress appropriated an unrestricted, lump-sum appropriation, that appropriation was legally available to satisfy contractual promises. See id. at 644, 125 S. Ct. at 1180.

Present Case Status. 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. Two dispositive motions are currently pending before this Court: On January 13, 2006, Defendants filed a renewed motion to dismiss, (docketed as #82), which Plaintiffs opposed on March 23, 2006, (docketed as #89). Defendants’ reply has been filed concurrently with this opposition. Thus, Defendants’ renewed motion to dismiss is now fully briefed and ready for adjudication. On January 14, 2006, Plaintiffs filed a motion for partial summary judgment (docketed as #81), to which this opposition responds.

Plaintiffs’ Motion for Partial Summary Judgment. Plaintiffs have moved for partial summary judgment on what they denominate “their claim for miscalculation of indirect contract support costs, required to be added to Plaintiffs’ Indian Self-Determination Act contracts.” Dkt. 81 (Mot. at 1-2). Specifically, they seek summary judgment declaring that “[t]he system relying on OMB Circular A-87 for determining indirect cost rates as applied by Defendants to determine [Plaintiffs’ entitlements to indirect CSC] violated the Indian Self-Determination Act and was therefore illegal.” Id. at 2-3. Plaintiffs’ central argument is that collateral estoppel precludes this Court from reaching the merits

of their legal contention “that the IHS methodology violates the ISDA.” Mem. at 18. Plaintiffs argue that Tenth Circuit’s pre-Cherokee decision in the BIA contractor litigation, Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (RNC),⁶ applies to IHS. Id.

The BIA Contractor Litigation: Ramah Navajo Chapter (RNC). The RNC class action was brought “on behalf of all Indian Tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA].” RNC v. Babbitt, No. CIV 90-0957, (Mem. Op.) at 1, (D.N.M. Nov. 4, 1998) (attached as Defs. Ex. EE), rev’d 112 F.3d at 1463-64; see RNC v. Lujan, No. Civ. 90-0957 (1st Am. Compl., ¶ 19) (attached as Defs. Ex. FF). In addition to naming the United States generally as a defendant, the complaint named as defendants agencies within the Department of the Interior: the Secretary of the Interior, the Assistant Secretary of the Interior for the Bureau of Indian Affairs (BIA), and the Chief of Interior’s Office of the Inspector General (OIG). RNC Compl. ¶¶ 2-4. BIA is Interior’s ISDA contracting component, and thus, the challenged ISDA contracts were BIA contracts. See RNC, 112 F.3d at 1458 (describing plaintiff’s FY 1989 self determination contracts with the BIA to take over five BIA programs). The BIA contractors challenged the BIA’s use of indirect cost rates, as negotiated by the plaintiff and the OIG pursuant to OMB A-87, in the BIA’s ISDA contracts. See RNC, 112 F.3d at 1458; RNC, 50 F. Supp. 2d 1091, 1097 (D.N.M. 1999).

The facts underlying the Tenth Circuit’s opinion were the lead plaintiff’s five BIA contracts from fiscal year 1989. RNC, 112 F.3d at 1458. The direct cost funding for the BIA contracts totaled \$755,770. Id. The plaintiff also had two 1989 state contracts funded by the Department of Justice totaling \$62,927. Id. at 1459. Thus, the BIA contracts comprised 92% of RNC’s program base, while the two state programs only constituted 8%. The district court found that the indirect costs for

⁶ The Ramah Navajo Chapter (RNC), lead plaintiff in RNC, is not the same entity as the Ramah Navajo School Board (RNSB), one of the two plaintiffs in this case.

administering the five BIA contracts were \$364,021, RNC, (Mem. Op.) at 3, but that the record was devoid of “the dollar amount of any indirect costs associated with the state contracts.” Id.

The plaintiff proposed to OIG (predecessor in function to NBC) an indirect cost rate for total administrative expenses, in which the denominator consisted only of the BIA’s direct costs, while the numerator consisted of the entirety of their anticipated administrative expenses (\$364,021/\$755,770), yielding a proposed indirect cost rate of 48.1%. RNC, 112 F.3d at 1459. OIG disagreed that the direct cost pool should be restricted to the BIA contracts, and offered a rate including the two state grants in the numerator, yielding an indirect cost rate of 44.5%. Id. Under this rate, plaintiff would receive \$336,318 in indirect costs for FY 1989, id., about \$28,000 less than the figure that the district court had found was required to run the entirety of its BIA contracts. See RNC, (Mem. Op.) at 3. The plaintiff agreed to use OIG’s rate, but administratively challenged BIA’s use of that rate in the BIA’s ISDA contracts, see RNC, 112 F.3d at 1459 (describing plaintiff’s filing of a CDA claim with BIA’s contracting officer).

Ultimately filing suit in federal court, the plaintiff claimed that the BIA failed to provide statutorily mandated indirect costs in accordance with Section 450j-1 of the ISDA. RNC, (Mem. Op.) at 1. Specifically, the plaintiff challenged the fact that the tribal contractors’ direct cost base included the costs of programs that did not pay indirect contract costs, thereby producing a rate that yielded a smaller indirect cost recovery for BIA contracted programs. RNC, 112 F.3d at 1459. The plaintiff contended that, as a result of including the two state programs in the direct cost base, the BIA underfunded the indirect costs associated with the BIA contracts, and that the ISDA required the BIA to pay all of the indirect costs associated with administering the two state contracts. RNC, (Mem. Op.) at 3. Interior argued that ISDA did not require the BIA to make up the shortfall in indirect cost funding from other federal and state agencies, and that the BIA was only obligated to

pay its share of the indirect costs associated with BIA contracts. Id. at 8. The district court, finding the statute clear and unambiguous, granted summary judgment in favor of Interior. Id. Rejecting the plaintiff's contention that the BIA was required to pay all indirect costs associated with administering non-BIA programs, the district court held that the BIA was required only to fully fund those indirect costs "as allocated to and associated with the BIA programs." Id. at 4, 9-10.

On appeal, the Tenth Circuit reversed, holding that the indirect cost rates used in the BIA contracts violated the ISDA. 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. Id. at 1460-61 (analyzing 25 U.S.C. §§ 450j-1(a)(2) and 450j-1(d)). The court emphasized the ISDA provision that, at that time stated "[n]othing 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."⁷ Id. at 1461 (quoting 25 U.S.C. § 450j-1(d)), as well as the provision mandating payment 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." Id. (quoting 25 U.S.C. § 450j-1(a)(2)). These two provisions, the court determined, were ambiguous on the question of the "extent to which indirect costs are to be funded by defendants." Id. The court emphasized the absence of statutory definitions for such terms as "reasonable costs" and "associated with." Id.

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 court agreed with the tribal contractors that the ISDA provisions "mandate that tribes executing self-determination contracts receive full funding for all reasonable contract support costs associated with self-

⁷ As discussed infra, Congress subsequently enacted 25 U.S.C. § 450j-2.

determination contracts.” Id. at 1463. By including in the direct costs base the funds the plaintiff had received from the two state grants, the court held that, “Defendants unreasonably interpreted the Act by applying the pre-amendment indirect costs formula to determine the amount of indirect costs funding plaintiff would receive for fiscal year 1989.” Id. The Tenth Circuit stated that although inclusion of the 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 the state 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.” Id.

Reversing and remanding the judgment of the district court, the Tenth Circuit noted that the indirect cost formula could continue to be used in compliance with Congressional directives, “with only slight modification.” Id. at 1464. In addition, “regardless of whether the formula is modified or abandoned, nothing in the Act entitles a tribe to a windfall . . . [but] the Act simply imposes a duty upon defendants to ensure that a tribe received sufficient funding to cover those reasonable indirect costs necessary to carry out its self-determination contracts.” Id.

On remand, Interior and the RNC plaintiffs entered into settlement negotiations, filing a First Partial Settlement Agreement (“PSA”) on August 31, 1998. Pl. Ex. 10. The PSA reserved, or “carved out” claims that the plaintiffs’ release did not cover, including:

any and all claims against IHS for underpayments of indirect costs or contract support under ISDEAA except those claims arising for FY 1989 - FY 1993 that are based on the indirect cost method described in paragraph 3.a.i , above developed by BIA and the Department of Interior Office of the Inspector General (DOI-OIG) and used by IHS for those years[.]

Id. (PSA at 4 ¶3(a)(iv)(3)).

Following the monetary settlement, the RNC plaintiffs and OIG (NBC’s predecessor)

conducted negotiations on their equitable claims regarding the method OIG used to compute indirect cost rates. RNC and OIG agreed to conduct a two-year trial, called “bench-marking”, in which BIA contractors could obtain a special indirect cost rate devised under cost allocation procedures created under the settlement. 2d Moberly Dec. ¶ 47. These cost allocation procedures are different from the normal cost allocation procedures mandated by the Circulars. Id. The “bench-marked” trial rate was to be applied only to the contractors’ BIA programs. Id. For all other programs, including IHS, the contractors still obtained a rate or rates calculated under the OMB circulars. Id. Other than affecting the final rates negotiated for fiscal years 2001 and 2002, no adjustments have been made to either the contractors’ BIA rates or rates calculated under the Circulars for any other years. Id.

On December 6, 2002, the district court approved a second partial settlement agreement settling claims for “indirect costs” for years up to and including 1994, settling claims for “direct CSC” for years up to and including 1995. RNC, 250 F. Supp. 2d 1303, 1317 (D.N.M. 2002). Equitable and monetary claims for years 1995 and forward (indirect CSC) and 1996 and forward (direct CSC) remain pending before that court. See Dkt. #89 at 37 n.22.

While Plaintiffs are members of the RNC class of BIA contractors, neither HHS (nor its ISDA contracting component IHS) are named defendants in the BIA contract litigation.

Congressional Response to the Tenth Circuit’s Decision. After the Tenth Circuit rendered its decision on May 8, 1997, Congress responded. As part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, PL 105-277, October 21, 1998, 112 Stat 2681, Congress amended the ISDA as follows to clarify that IHS funds may only be expended for indirect CSC directly attributable to IHS programs. See 25 U.S.C. § 450j-2, Pub. L. 105-277, Div. A, § 101(e) [Title II], Oct. 21, 1998, 112 Stat. 2681- 280. Several years after Congress enacted this amendment, Plaintiffs filed their first complaint. (Dkt. #1.)

ARGUMENT

1. Standard of Review

Under Rule 56(c), this Court may only grant a motion for summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party, Bayer v. United States Dep't of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992), drawing all reasonable inferences in the nonmoving party's favor, and without making credibility determinations or weighing the evidence, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 135, 150, 120 S. Ct. 2097 (2000).

2. **This Court Is Entitled to Reach the Merits of Whether IHS May Use Indirect Cost Rates Calculated Pursuant to OMB A-87 In IHS's ISDA Contracts; Collateral Estoppel (Issue Preclusion) Does Not Bar the Court's Review.**

Plaintiffs cannot depend upon collateral estoppel to evade legal scrutiny of their claims. The Tenth Circuit's holding in RNC, that the BIA's use of the OMB A-87 methodology violates the ISDA, does not apply to this case. The RNC litigation involves a different contracting agency (BIA rather than IHS), operating under different contracting policies, regulations and appropriations; different contracts for different programs; and a different, albeit overlapping, class of tribal contractors (BIA contractors rather than IHS contractors).

Contrary to Plaintiffs' assertions, neither HHS nor IHS stands in privity with Interior, the BIA or NBC. Nor are HHS or IHS bound based on Plaintiffs' characterization of the United States as “the real party in interest.” Neither HHS nor IHS was a named defendant in the BIA contract litigation. IHS's contracts, appropriations, regulations, contracting policies, and programs were not

at stake in that court. Whether or not IHS participated in a task force to study contract support issues is simply irrelevant to the question of privity. Plaintiffs efforts to inflate the IHS role in the BIA contract litigation relies upon language in the BIA contractor settlement agreement – language that serves only to defeat Plaintiffs’ argument. The plain language of the settlement agreement, applicable against the Plaintiffs, demonstrates that neither HHS nor IHS were defendants *sub silentio* in the BIA litigation.

Plaintiffs have failed to satisfy the requirements of collateral estoppel. But even if this Court agrees that the preconditions for collateral estoppel’s application of have been met, this Court should nevertheless exercise its discretion and decline to apply the doctrine (i) because application of the doctrine under these circumstances would effectively “freeze the law,” and (ii) the well-established exception for a change in the legal climate applies. Since the Tenth Circuit’s ruling, the legal landscape has changed both legislatively and judicially, triggering the relevant exception to collateral estoppel.

a. Collateral Estoppel, Generally.

“Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” United States v. Mendoza, 464 U.S. 154, 158, 104 S. Ct. 568, 571 (1984). Like the related doctrine of res judicata,⁸ collateral estoppel (also known as issue preclusion), “serves ‘to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’” Id. (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411 (1980)).

⁸ Under the doctrine of res judicata, (also known as claim preclusion) “a final judgment on the merits bars further claims by parties or their privies on the same cause of action.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 571.

However, “[t]he doctrine is detailed, difficult, and potentially dangerous.” Jack Faucett Assoc., Inc. v. Am. Tel. & Tel. Co., 744 F.2d 118, 124, 133 (D.C. Cir. 1984) (holding district court abused its discretion in applying offensive collateral estoppel to defendants in class action based on, inter alia, fundamental unfairness to the defendants).

Collateral estoppel may be used either offensively or defensively. A plaintiff uses collateral estoppel offensively when the plaintiff “seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 571. In contrast, “[d]efensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.” Id. As discussed infra, the offensive use of collateral estoppel raises special equitable concerns, see Jack Faucett, 744 F.2d at 125-26. In this case, Plaintiffs seek to use collateral estoppel offensively.

In cases of offensive use of collateral estoppel against the United States government, an initial condition must be established, namely that the parties must be the same in each proceeding, otherwise known as the “mutuality” requirement. Compare Mendoza, 464 U.S. at 163, 104 S. Ct. at 574 (“We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government . . .”), with United States v. Stauffer Chem. Co., 464 U.S. 165, 104 S. Ct. 575 (1984) (approving defensive use of collateral estoppel against the EPA, where the EPA and the opposing party were litigants in both proceedings). In addition, a party must satisfy three other conditions before it may invoke collateral estoppel to preclude a party from relitigating an identical issue previously decided: (1) the “issue must have been actually litigated, that is contested by the parties and submitted for determination by the court,” (2) the issue must have been “actually and necessarily determined by a court of competent jurisdiction” in the first proceeding, and (3)

preclusion in the second proceeding “must not work an unfairness.” Jack Faucett, 744 F.2d at 125.

Plaintiffs have failed to establish three of these four criteria, namely, the conditions of mutuality, identity of the litigated issue, and fairness.

b. Because HHS Was Not a Party to the BIA Contractor Litigation (RNC), Plaintiffs Have Failed to Satisfy the Mutuality Requirement Established in *US v. Mendoza*

The Mutuality Requirement. The Supreme Court has “long recognized that the Government is not in a position identical to that of a private litigant,” because of the “geographic breadth of governmental litigation,” and particularly “the nature of the issues the government litigates.” Mendoza, 464 U.S. at 159, 104 S. Ct. at 572 (quotation marks and citation omitted). “[T]he government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.” Id. at 160, 104 S. Ct. at 572. Accordingly, the Court has observed that litigation conduct by the government is “apt to differ from that of a private litigant.” Id. at 161, 104 S. Ct. at 573.⁹

The unique problems faced by the government as a litigant led to the landmark decision of United States v. Mendoza, in which the Supreme Court established the mutuality requirement for offensive collateral estoppel as applied against the United States. Mendoza, a Filipino national, had sued the government for naturalization under a defunct statute. Id. at 155, 104 S. Ct. at 570. An earlier lawsuit, involving a different group of Filipino petitioners, had decided the pertinent issue against the government and, based upon that previous decision, the lower courts in Mendoza’s case had precluded the government from relitigating the question. Id. at 156-57, 104 S. Ct. at 570-71.

⁹ For example, while a private litigant might forego an appeal out of a belief that he or she might lose, “the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal.” Id. Because “policy choices are made by one Administration, and often reevaluated by another Administration, courts should be careful when they seek to apply expanding rules of collateral estoppel to government litigation.” Id. at 162, 104 S. Ct. at 573.

The Supreme Court reversed, holding that “nonmutual offensive collateral estoppel simply does not apply against the government.” Id. at 162, 104 S. Ct. at 573.

The heart of the Mendoza Court’s analysis was the practical concern that “[a] rule allowing nonmutual collateral estoppel against the government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue.” Id. at 160, 104 S. Ct. at 572. Routine application of nonmutual collateral estoppel would force the Court to revise its practice of awaiting a Circuit split to develop before granting the government’s petition for certiorari. Id. “Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.” Id. In contrast, establishing a threshold requirement of mutuality of parties “will better allow thorough development of legal doctrine by allowing litigation in multiple forums. Id. at 163, 104 S. Ct. at 574.¹⁰

Mendoza’s companion case, United States v. Stauffer, illustrates the restricted availability of collateral estoppel against the government in the case of identical litigants in the two proceedings. In Stauffer, the Environmental Protection Agency (EPA), seeking to enforce the Clean Air Act, litigated against Stauffer Chemical Company the issue of whether the EPA could use private contractors to inspect Stauffer’s Tennessee plants. 464 U.S. at 166-67, 104 S. Ct. at 576. However, the EPA had already litigated that question against Stauffer in a prior proceeding involving one of

¹⁰ The Court’s concerns underlying its disapproval of collateral estoppel against the government “are for the most part inapplicable where mutuality is present.” Id. at 163-64, 104 S. Ct. at 574. Res judicata “prevents the government from relitigating the same cause of action against the parties to a prior decision.” Id. at 163, 104 S. Ct. at 574. Not only does applying collateral estoppel “spare a party that has already prevailed once from having to relitigate,” but applying collateral estoppel “when the government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party.” Id. at 164, 104 S. Ct. at 573-74.

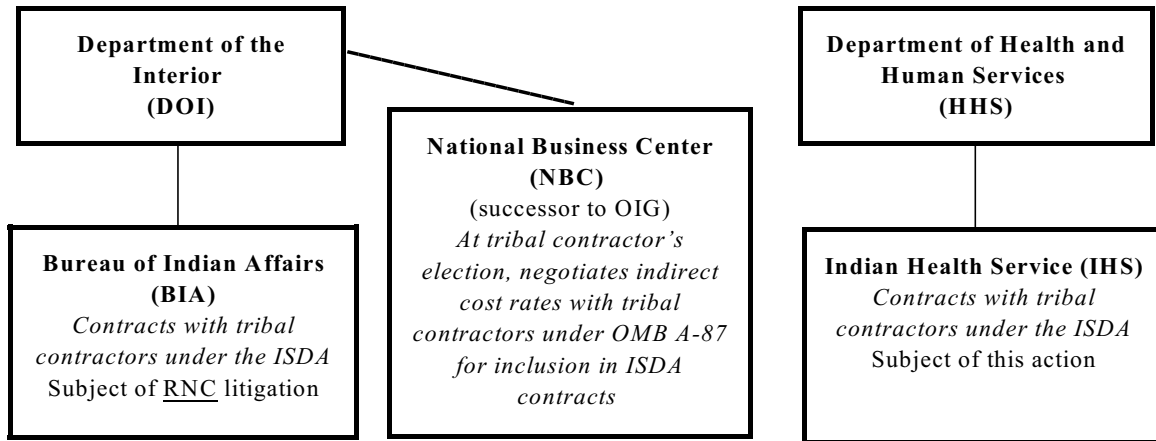
Stauffer's Wyoming plants. Id. at 173, 104 S. Ct. at 580. Invoking collateral estoppel defensively, Stauffer sought to preclude the EPA from relitigating the issue. Id.

The Supreme Court observed that where the parties are identical, the concern that "the application of collateral estoppel in government litigation involving recurring issues of public importance will freeze the development of the law" was reduced. Id. at 168, 104 S. Ct. at 577. Under these circumstances, the Stauffer Court agreed 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." Id. at 169, 104 S. Ct. at 578.

HHS and Interior, Generally. HHS (IHS) and Interior (BIA) are different federal executive branch agencies operating in different spheres of statutory authority. E.g. Indian Health Care Improvement Act, 25 U.S.C. §§1601 *et seq.* (health program authorization for IHS); Transfer Act, 42 U.S.C. § 2001 (transferring authority to provide health services benefitting Indian Tribes from Interior to HHS). IHS and BIA operate under agency-specific CSC policies and guidance, compare Cherokee Nation, 311 F.3d 1054, 1058 (10th Cir. 2002) (describing IHS's CSC distribution policy), rev'd by 125 S. Ct. 1172 (2005), with Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338, 1348-49 (D.C. Cir. 1996) (explaining the pro rata CSC distribution policy later implemented by BIA). Congress appropriates funding for the IHS and the BIA separately, and the appropriations are made in different amounts and subject to different requirements.¹¹

¹¹ Compare e.g., Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) (IHS) with Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1389 (1993) (BIA). For example, as provided in the fiscal year 1994 appropriations act, Congress limited the amount that BIA could expend on CSC by explicit cap, whereas in the same year, Congress did not put an explicit cap in the IHS appropriation. In addition, Congress made BIA's fiscal year 1994 funding available for obligation for a two-year period of time, whereas IHS's fiscal year 1994

While the Secretary of the Interior is a named party in both this action and in RNC, the claim against the Secretary of the Interior in the BIA contractor litigation differs markedly from Plaintiffs’ claim against the Secretary of the Interior in this action. Plaintiffs have contracted for health



programs with IHS, and challenge “the IHS methodology” of determining indirect costs in IHS contracts under OMB A-87. Dkt. #81 (Mem. at 18. Tribal contractors elect to negotiate these rates with NBC (the cognizant agency) for inclusion in ISDA contracts with IHS. Ketcher Dec. ¶ 35; Zuni Dec. ¶ 27. NBC is a component of Interior. However, NBC neither negotiates, participates in the formation of, nor funds the actual ISDA contracts. 2d Moberly Dec. ¶ 4. IHS negotiates and forms ISDA contracts on behalf of HHS, under HHS’s applicable statutory and regulatory authority, policies, and appropriations. Ketcher Dec. ¶¶ 1, 28-35; Zuni ¶ 2, 20-27. Accordingly, in this action challenging IHS contracts and IHS’s use of the relevant rates, NBC’s role (as cognizant agency for negotiating the indirect cost rate under OMB A-87) is incidental to Plaintiffs’ claim “that the IHS methodology violates the ISDA.” (Mem. at 18.)

In RNC, BIA was the contracting agency on behalf of Interior. See RNC, 112 F.3d at 1458; RNC, 50 F. Supp. 2d at 1094. Thus Interior wore two hats in the RNC litigation: (1) through the

appropriations were available for obligation for just one year.

BIA, it negotiated and formed the ISDA contracts that used the rate under Interior's applicable statutory and regulatory authority, policies, and appropriations, and (2) through NBC (and its predecessor OIG), it negotiated the indirect cost rate. (See also 2d Compl. ¶¶ 11-13B).

The Secretary of HHS Was Not a Party to the RNC Litigation. Plaintiffs levy two arguments to support their contention that the Secretary of HHS was somehow a party to the BIA contractor litigation, notwithstanding the fact that RNC was a class action brought "on behalf of all Indian Tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA]." RNC, (Mem. Op.) at 1 (emphasis added). Plaintiffs argue (i) that the United States is the "real party in interest when it comes to contract claims under ISDA" (Mem. at 22), and (ii) that HHS and Interior stand in privity with each other by IHS's purported background participation in the RNC litigation, (Mem. at 22-23). Each argument fails in turn.

Plaintiffs' arguments are opaque as to how, precisely, they believe that the axes of privity run. It is unclear whether they are asserting (1) that IHS is in privity with NBC (the agency negotiating indirect cost rates under OMB A-87), (2) that IHS is in privity with BIA (the agency negotiating and forming ISDA contracts on behalf of Interior), (3) that IHS is in privity with both BIA and NBC, (4) that IHS is in privity with the United States generally, or (5) that the Secretary of HHS is in privity with the Secretary of the Interior. Compare Mem. at 1-2, 18-19, 23.

For example, Plaintiffs contend "[t]hat the Defendant Secretary here is HHS instead of Interior does not matter." (Mem. at 22). They also assert that "[t]he United States, not the agency or official sued, is the real party in interest when it comes to contract claims under ISDA." (Id.) Plaintiffs principally rely upon Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907 (1940) and Mervin v. Federal Trade Commission, 591 F.2d 821 (D.C. Cir. 1978), for the proposition that "[t]here is privity between officers of the same government so that 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.” Sunshine Anthracite Coal, 310 U.S. at 402-03, 60 S. Ct. at 917.

In Sunshine Anthracite Coal, a coal producer had unsuccessfully challenged an administrative commission’s classification of its coal. 310 U.S. at 390-91, 60 S. Ct. at 911. The coal commission was empowered to categorize different types of coal under the Bituminous Coal Act, and coal falling into specific categories were subject to different taxation levels. Id. at 401-02, 60 S. Ct. at 916. When the classification led to a high tax rate, the coal producer attempted to relitigate the propriety of the classification directly with the Commissioner of Internal Revenue. Id. The coal producer sought to avoid the preclusive effects of the coal commission’s original classification ruling by arguing that the administrative proceeding “did not involve the assessment of taxes and since the [board] had no authority to determine the status of appellant’s coal.” Id. at 401, 60 S. Ct. at 916. Rejecting the producer’s argument, the Court noted that “the Commissioner of Internal Revenue is merely the agency to collect taxes levied under the Act; he is not the administrative agent whom Congress has designated to determine what coal is exempt.” Id. at 401-02, 60 S. Ct. at 916.

In holding that there was privity between the coal commission and the Internal Revenue Commissioner as officials of the United States, the Court observed that “[i]dentity of parties is not a mere a matter of form, but of substance. Parties nominally the same, may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same.” 310 U.S. at 402, 60 S. Ct. at 917 (internal quotation marks and citation omitted). “The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.” Id. at 403, 60 S. Ct. at 917. “There can be no question that [the coal commission] was authorized to make the determination of the status of

appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid . . . That suit therefore bound the United States, as well as the appellant." Id. at 403, 60 S. Ct. at 917.

Mervin involved an ex-employee's wrongful dismissal claim against the Federal Trade Commission (FTC). 591 F.2d at 828. He had previously pressed an unsuccessful administrative claim for the dismissal before the Civil Service Commission. Id. at 828-29. Citing Sunshine Anthracite Coal, the court observed that the "fact that the present defendant is the FTC, while the defendant in one of the prior cases was the [Civil Service Commission]" did not prevent the Court from precluding the relitigation of his dismissal. Id. at 830. "The [Civil Service Commission] was involved in the prior case only because statutes and regulations establish it as the forum for administrative appeals by terminated government employees." Id. at 831.

Many courts and commentators, however, have rejected a reading of Sunshine Anthracite Coal that would yield a rule of strict privity between government agencies. Instead, they focus on the Supreme Court's qualification that "[t]he crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." Sunshine Anthracite Coal, 310 U.S. at 403, 60 S. Ct. at 917; See Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 211 (3d Cir. 1993) (noting that Sunshine Anthracite Coal had qualified its statement about privity between governmental officers, and concluding that "we are therefore directed [by Sunshine Anthracite Coal] to look to the authority Congress delegated to both administrative agencies to bind the government in a final adjudication."); FTC v. Texaco, Inc., 555 F.2d 862, 866-81 (D.C. Cir. 1977) (en banc) (although not reaching question of whether one agency's review of gas data collaterally estopped another agency's investigation into the same data, expressing skepticism that collateral estoppel would apply in this

“era of overlapping agency jurisdiction under different statutory mandates”).¹²

In Facchiano Construction, for example, the Third Circuit contrasted the statutory and regulatory authority vested in the Secretary of HUD with the authority vested in the Secretary of Labor. 987 F.2d at 211-12. The court compared “[t]he plain language of the statute and regulatory scheme limit[ing] HUD’s debarment authority to participation in HUD programs,” with DOL’s “broad delegated authority” to debar contractors from all federal contracts. Id. at 212; see also id. (“HUD had no authority to debar participation from other federal contracting programs.”). Because of the limitations on the scope of HUD’s enforcement authority, “HUD, even though it acted as a representative of the United States, did not have ‘authority to represent [the United States]’ interests in a final adjudication of the issue in controversy.” Id. (quoting Sunshine Anthracite Coal, 310 U.S. at 403, 60 S. Ct. at 917).

In contrast, both Sunshine Anthracite Coal and Mervin reflect examples of agencies that in the prior proceeding, have the authority to represent the United States’ interests in the issue in the subsequent proceeding. In Sunshine Anthracite Coal, the issue in the subsequent proceeding was

¹² See also United States v. Alky Ents., 969 F.2d 1309, 1314-15 (1st Cir. 1992) (citing Sunshine Anthracite Coal as mandating inquiry into whether the representative agency has authority to “represent [the United States]’ interest in a final adjudication of the issue in controversy”); Headley v. Bacon, 828 F.2d 1272, 1276 (8th Cir. 1987) (rejecting reading of Sunshine Anthracite Coal “as stating a rule that a government and its officers are always in privity” but instead scrutinized identity of interests between government entity and employees); Charles Alan Wright, et al., Fed. Practice & Proced. § 4458 (2005) (“As the Sunshine Coal opinion warns, however, *preclusion may be defeated* by finding such an important difference in the functions of different agencies that one does not have authority to represent all parts of the government.” (emphasis added)); Restatement (2d) of Judgments § 36 Comment (f) (2005) (“Government agencies having distinct responsibilities”) (“In some circumstances, a prior determination that is binding on one agency and its officials may not be binding on another agency and its officials. The problem is analogous to that in determining the capacity in which the underlying transactions were conducted If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.”).

the propriety of the coal classification for taxation purposes; in the prior administrative proceeding, the coal commission was authorized (indeed, it was statutorily created for this very purpose) to represent the United States' interests in determining coal classification. The implementation of the Coal Act depended on vesting the classification role exclusively in a single administrative entity, because the purpose of the Act was "stabilization of the industry primarily through price-fixing and the elimination of unfair competition." 310 U.S. at 387-88, 60 S. Ct. at 909-10. Similarly, in Mervin, the issue in the later proceeding was Mervin's wrongful discharge claim; in the prior action, the Civil Service Commission was the statutorily created "forum for administrative appeals by terminated government employees." 591 F.2d at 830.

Here, IHS and the BIA have similar restrictions on the scope of their contracting authority; their interests are not congruent. Plaintiffs conflate the BIA and IHS's distinct statutory authority by pointing to the ISDA alone. (Mem. at 18). Certainly, the ISDA authorizes each Secretary to enter into self-determination contracts. But the very nature of ISDA contracts – in which tribal contractors *assume control* of programs and services from the agencies – requires a more complex analysis. The authority to contract for particular programs and services under the ISDA derives from each agency's statutory area of control. If a federal court declares an ISDA contract invalid, or if a tribal contractor retrocedes the contract, then the source agency must resume control of the program that was the subject of the contract. Ketcher Dec. ¶ 31; Zuni Dec. ¶ 22. Thus, challenges to an agency's ISDA contracting policies and practice directly implicate the agency's statutory authority and policies pertaining to the underlying programs.

The BIA lacks statutory authority to administer health services, authority expressly delegated to the Secretary of HHS. See 25 U.S.C. §§1601 *et seq.*; 42 U.S.C. § 2001. IHS, similarly, lacks authority to administer schools or to provide social services programs. Though the BIA (through the

DOJ) defended the RNC litigation over BIA contracts, the BIA lacked the ‘authority to represent [the United States’] interests in a final adjudication’ of the issue of IHS’s use of indirect cost rates in the IHS’s ISDA contracts. Facchiano Constr., 987 F.2d at 212 (quoting Sunshine Anthracite Coal, 310 U.S. at 403, 60 S. Ct. at 917). In the absence of the delegated authority to represent the United States’ interests in the administration of health services, a decision against BIA is insufficient to bind IHS. See id. at 212; see also United States v. Alky Ent., 969 F.2d 1309, 1314-15 (1st Cir. 1992) (Holding that, “despite the fact that both actions pertained to the same violations,” “[b]ecause the ICC did not have statutory authority to represent the United States’ interest in collecting civil penalties, we hold that, for purposes of the present case, the ICC and the United States were not in privity.”).

By styling their motion as seeking partial summary judgment on the “miscalculation” claim, Plaintiffs also appear to be arguing that IHS is in privity with NBC, by virtue of NBC’s role as negotiator of the indirect cost rates. (See Mem. at 19.) For this proposition, Sunshine Anthracite Coal and Mervin are distinguishable because they both depend upon regulatory schemes vastly different from the flexible regulatory scheme at issue here.

Both cases involve coordinating agencies, the coal commission and the Revenue Service Commissioner in Sunshine Anthracite Coal, and the FTC and Civil Service Commission in Mervin. Sunshine Anthracite Coal involved agencies in a lock-step relationship, where one agency’s actions relied entirely upon the decision of the other. The coal commission classified the coal in an adversarial administrative proceeding, and the Revenue Service passively collected the taxes based on that classification. See Sunshine Anthracite Coal, 310 U.S. at 401, 60 S. Ct. at 916 (“Hence, the [coal] Commission determines the scope of the provisions of the [Coal] Act and their applicability to various producers. The Commissioner is given no administrative functions whatsoever except

tax collection.”). The implementation of the Coal Act itself depended on vesting the classification role exclusively in a single administrative entity, because the purpose of the Act was “stabilization of the industry primarily through price-fixing and the elimination of unfair competition.” *Id.* at 387-88, 60 S. Ct. at 909-10. Similarly, in Mervin, the Civil Service Commission was the statutorily created “forum for administrative appeals by terminated government employees.” 591 F.2d at 830. Thus, Mervin was *required* to pursue his administrative remedies for challenging the FTC’s action before the CSC.

In contrast, the relationship between IHS and NBC is markedly different. NBC negotiates indirect cost rates with tribal contractors under OMB A-87 *at the tribal contractor’s election*. Zuni Dec. ¶ 27; Ketcher Dec. ¶ 35. IHS contracting policy permits, but does not require, the use of those indirect cost rates. *Id.* IHS has no role in how tribal contractors negotiate their rates with NBC, nor does IHS pressure tribal contractors into using a single rate, rather than special or multiple rates to reflect a given tribal contractor’s unique mix of programs. Ketcher Dec. ¶¶ 34-35; Zuni Dec. ¶¶ 26-7. Additionally, IHS does not require tribal contractors to use A-87 indirect cost rates at all, whether single, multiple, or special; instead they can negotiate directly with IHS regarding the agency’s indirect CSC funds. *Id.* Other tribal contractors have opted to take advantage of these various indirect cost determination options. Ketcher ¶ Dec. 35. IHS’s implementation of the ISDA with a flexible contracting policy, which permits tribal contractors to submit their OMB A-87 rates as a basis for indirect cost recovery - but does mandate the use of those rates – is a far cry from the rigid regulatory regimes reflected in Sunshine Anthracite Coal and Mervin, where one agency was compelled to use the other agency’s determination.

Plaintiffs offer a second argument as to why IHS should be considered in privity with BIA or NBC for the purposes of establishing mutuality of parties: that “IHS was an actor in RNC v.

Lujan.” (Mem. at 23.) They state that “IHS was in fact an active informal participant in and observer of the RNC v. Lujan litigation, especially on remand.” (Mem. at 22.) They assert that IHS was “represented and participated in settlement of RNC v. Babbitt in 1998,” (Id.) emphasizing how the 1998 settlement agreement “specifically referred to IHS.” (Mem. at 23). The suggestion of these assertions, effectively, is that IHS was somehow a de facto party, and that IHS could have “stepped in at any time” to ensure that IHS interests in the OMB A-87 rate system were protected. See Dkt. #89 (Mem. at 22 n.10). This argument similarly fails as a red herring, and in fact, underscores the impropriety of Plaintiffs’ strategic behavior by asserting collateral estoppel in this action.

First, Plaintiffs have no basis for suggesting that IHS was an “active informal participant” in the RNC litigation. All they have shown is that the previously negotiated original settlement agreement between Interior and the RNC plaintiffs made reference to reserving future claims against IHS, see Pl. Ex. 10 (Memorandum of August 19, 1998), and that changes were made to make even more explicit that future plaintiffs needed to pursue claims against IHS separately. The unremarkable fact that HHS (or IHS) gave that language “the green light,” see id. (Letter of Leslie Batchelor), does not in itself transform IHS into a de facto party operating in the background of the RNC litigation.¹³ The United States agreed pay in excess \$73 million to settle any and all of the RNC plaintiffs’ claims arising from fiscal years 1989-1993, and the plaintiffs agreed to release against *all* federal agencies, including IHS, for those years. See Pl. Ex. 10 (PSA at 4 ¶¶ 3(a)(ii), (iii), (iv)(3); Release at 1). Plaintiffs reserved the right to pursue certain claims against IHS *separately*. Id. Indeed, the reasonable inference drawn from the changes to the settlement agreement only serves

¹³ Cf. Montana v. United States, 440 U.S. 147, 154, 99 S. Ct. 970, 974 (1979) (finding mutuality between a party to a state litigation and the nonparty United States where the United States (1) required the suit to be filed (2) reviewed and approved the complaint (3) paid for the attorney’s fees and cost, (4) directed the state appeal (5) appeared and submitted a brief as amicus (6) directed the petition for certiorari, and (7) controlled the legal strategy).

to demonstrate that IHS was never a party to the case.¹⁴ See Reeves, 530 U.S. at 150, 120 S. Ct. 2097 (requiring a court reviewing a motion for summary judgment to draw all reasonable inferences in the nonmoving party's favor, and without making credibility determinations or weighing the evidence). Nor, for that matter, did plaintiffs consider that IHS was so bound, as evidenced by the RNC plaintiffs' failure to name the Secretary of HHS or the director of IHS, or any HHS official as a party.

By not challenging IHS's contracts and policies in the prior action, the RNC plaintiffs evinced their own understanding and intent that IHS's contracting practices and policies were separate and apart from BIA's. See Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (discussing substantive unfairness when a party lacks incentive to litigate an issue in the initial proceeding, "but the stakes of the second trial are of a vastly greater magnitude"). That understanding is underscored by the language in the settlement that expressly reserves the claims against IHS for another day. See Pl. Ex. 10 (PSA at 4 ¶¶ 3(a)(ii), (iii), (iv)(3); Release at 1).

Instead, the RNC plaintiffs challenged only the BIA's contracts, programs, appropriations, contracting policies, and statutory authority. See RNC, (Mem. Op.) at 1 (noting class is brought "on behalf of all Indian Tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA]." (emphasis added)); see also RNC Compl. at ¶ 19. For example, to the extent that the RNC plaintiffs sought relief under the CDA, only Interior's appropriations were threatened,

¹⁴ While Defendants do not agree with many of Plaintiffs' self-serving interpretations of the legal effect and scope of the provisions in the settlement agreement, as reflected in the correspondence of the RNC plaintiffs' counsel Bobo Dean in Plaintiffs' Ex. 10, it is notable that even that even that correspondence admitted that IHS was not a party to the case. See Pl. Ex. 10 ("[I]t does not seem appropriate to us to include in the settlement a waiver of potential claims which were not raised in the case (no claim was made against IHS)." Pl. Ex. 10 (Memorandum of August 19, 1998). Cf. SBC Comms. Inc. v. FCC, 407 F.3d 1223, 1230 (D.C. Cir. 2005) (noting "the purpose of claim preclusion is to prevent litigation of matters that should have been raised in an earlier suit" (citation and internal quotation marks omitted)).

as only Interior would have been responsible for reimbursing the Judgment Fund out of its appropriations. See 41 U.S.C. § 612(c) (“Reimbursement”) (Payments . . . shall be reimbursed to the fund . . . *by the agency whose appropriations* were used for the contract out of available funds or by obtaining additional appropriations for such purposes.” (emphasis added)).

Plaintiffs should not now be permitted to have it both ways. If they truly thought IHS was a necessary party for complete relief, then they should have exercised their rights to force IHS involvement in the case. At most, all Plaintiffs have shown is that IHS was aware of the BIA litigation, and that when Interior and the BIA contractors reached an agreement that referred to future cases against IHS, HHS approved language emphasizing that future plaintiffs had to pursue IHS separately. These arguments are nothing more than a distraction from the fact that these Plaintiffs at best failed to police their own interests in the RNC litigation, or at worst, tried to sneak one past IHS by avoiding the inclusion of IHS in the RNC litigation or any allegations regarding IHS contracts.

Plaintiffs also stress IHS’s putative role in a nationwide task force, formed by the National Congress of American Indians (NCAI) during the 1998 settlement negotiations. RNC, 50 F. Supp 2d at 1099.¹⁵ IHS’s alleged role in a taskforce whose “aim . . . is to produce a recommendation to

¹⁵ Plaintiffs have elsewhere misstated the RNC district court’s description of the task force. See dk. #89 at 22 n.10 (“In addition, IHS was involved in a nationwide task force of Indian tribes, organizations, and the BIA, which monitored the case including the settlement.” (Emphasis added)). Defendants respectfully refer the Court to what the district court actually stated. See RNC, 50 F. Supp. 2d at 1099 (“NCAI also participated actively in the negotiations. In addition, it has created a Task Force . . . to review the indirect cost system for ISDA as it exists in the BIA and Indian Health Service (IHS) systems. . . . The aim of the Task Force is to produce a recommendation to Congress and to the agencies . . .”). The task force described by the district court was aimed at policy recommendations, and says nothing about whether the task force monitored the litigation, only that NCAI did so. Id. Defendants also dispute that IHS even played a role in the task force to begin with, but note that the scope of IHS’s role is not a material fact because the existence of a policy-focused task force is irrelevant to the question of privity in litigation.

Congress and to the agencies to reform the indirect cost system” is wholly irrelevant to the question of whether IHS stood in privity with Interior with respect to the interests at stake in the *litigation*.

c. IHS Use of OMB A-87 Rates in IHS Contracts is a Different Issue than BIA’s Use of the Rates in BIA contracts

While there is undoubtedly similarity between the claims raised in the RNC litigation and the one before the Court in this action, the issues are not legally identical. See Jack Faucett, 744 F.2d at 125 (requiring issue to “have been actually litigated, that is contested by the parties and submitted for determination by the court.” (quoting Otherson v. Dep’t of Justice, 711 F.2d 267, 273 (D.C. Cir 1983)). Plaintiffs have styled this motion for partial summary judgment as seeking summary judgment that the indirect cost rates were miscalculated. However, their actual claim in this case centers on IHS’s *use* of OMB A-87 indirect cost rates in IHS contracts for determining payment. These two questions (were the rates miscalculated vs. was IHS’s use of the rates proper), are not neatly separable, because they implicate IHS’s specific contracting authority and policies, as well as a whole host of contract defenses relevant to this action. Accordingly, the “issue” in this case is simply not the same as the “issue” in the RNC litigation. In the RNC action, the issue was whether the BIA’s use of OMB A-87 indirect cost rates in BIA’s contracts complied with the ISDA.

As already described, each agency is restricted by its distinct statutory sphere of authority, and operates under different appropriations, statutory imperatives, regulations and policies. Evidence of IHS contracting policies, such as the availability of direct negotiation with IHS for indirect costs, would have been irrelevant to the issue of BIA’s contracting policies. Similarly, the programs and services that are the subject of IHS ISDA contracts are distinct from those of the BIA. Any relevant evidence relating to the negotiation of the IHS ISDA contracts would be in IHS’s control. See Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1117-18 (9th Cir. 1999) (rejecting

collateral estoppel where defendant was charged identically with fraud as to savings and loan institutions, but evidence relating to each institution was unique to that savings and loan); Builders Assoc. of Greater Chicago v. City of Chicago, No. 96 C 1122 (Mem. Op.) 2001 WL 664453, at *6 (N.D. Ill. June 12, 2001) (holding issue not identical in subsequent case involving entities that “have geographically different territories, and are concerned with different public construction projects, and thus the contracts may attract potentially different general contractors and subcontractors” because the evidence relating to the two entities would differ).

d. Offensive Collateral Estoppel In these Circumstances Would Work a Fundamental Unfairness Under *Parklane Hosiery*; Plaintiffs Could Have Named the Secretary of HHS as a Defendant, or Insisted on A Different Class in the Earlier Litigation From its Inception But Instead Chose a “Wait and See” Stance

Even were the Court to agree that (i) IHS stood in privity with the BIA (or NBC) in a suit where IHS was not named, and (ii) that the issue of BIA’s use of rates calculated by OIG under OMB A-87 was identical to the issue of IHS’s use of rates calculated by NBC under OMB A-87, Plaintiffs have failed to satisfy a third threshold requirement of collateral estoppel: that preclusion “in the second trial must not work an unfairness.” Jack Faucett, 744 F.2d at 125 (citations and quotation marks omitted). “Where offensive estoppel is involved, the element of ‘fairness’ gains special importance.” Id.

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645 (1979), the Supreme Court warned about the grave dangers associated with offensive collateral estoppel. “[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does . . . defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive.” Parklane Hosiery, 439 U.S. at 329-30 99 S. Ct. At 650-51. In addition, the

Court warned that reviewing courts should not permit offensive collateral estoppel, when “it may be unfair to a defendant,” such as when “a defendant in the first is sued for small or nominal damages” as that defendant “may have little incentive to defend vigorously, particularly if future suits are not foreseeable.” Parklane Hosiery, 439 U.S. at 329-30; 99 S. Ct. at 650-51. While declining to preclude the use of offensive collateral estoppel, the Court granted “broad discretion to determine when it should be applied. Id. at 332, 99 S. Ct. at 651. “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, for [reasons such as unfairness to the defendant], a trial judge should not allow the use of offensive collateral estoppel.” Id. at 332, 99 S. Ct. at 651-52.

The D.C. Circuit has held that, under the teachings of Parklane Hosiery, “fairness to the defendant thus is a critical finding necessary for the application of offensive estoppel.” Jack Faucett, 744 F.2d at 125 (citation and quotation marks omitted). “This notion of fairness reflects the equitable nature of issue preclusion. . . . Offensive collateral estoppel is even a cut above that in the scale of equitable values.” Id. (citation and quotation marks omitted). The D.C. Circuit discerned examples from Parklane Hosiery in which offensive collateral estoppel should not be applied, including “where the party against it is to be applied had no incentive to defend vigorously the first action.” Id. at 126. See also Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (citing with approval distinction between offensive and defensive collateral estoppel).

While some courts have viewed Mendoza and Stauffer as dispensing with the distinction between offensive and defensive collateral estoppel, see Hercules Carriers, Inc. v. Claimant State of Fla., Dep’t of Transp., 768 F.2d 1558, 1579 (11th Cir. 1985), Mendoza’s analysis does not turn on the equitable concerns delineated in Parklane Hosiery. Parklane Hosiery focused upon whether

the plaintiff had an incentive not to join all the relevant parties in the earlier proceeding, or whether the party in the first proceeding had the same incentive to litigate the issue that it did in the second proceeding. Id. at 329-30, 99 S. Ct. at 650-51. Instead, Mendoza and Stauffer established the mutuality requirement in government litigation to address a different concern: that non-mutual collateral estoppel permits a single decision to freeze the law. Mendoza, 464 U.S. at 162-63, 104 S. Ct. at 573-74.

This case illustrates the continuing viability of the distinction between offensive and defensive collateral estoppel in the context of government litigation. First, this case reflects an example of how “defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive.” Parklane Hosiery, 439 U.S. at 329-30, 99 S. Ct. at 650-51. Plaintiffs have argued that, because they are members of the RNC class, they themselves would have been precluded from suing IHS had they lost, and thus IHS should be equally bound. See Mem. at 21 (citing Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S. Ct. 2794 (1984)). But this assertion underscores how Plaintiffs engaged in strategic behavior reflecting a lack of incentive to take steps to “join all potential defendants in the first action if possible.” Id. at 329-30, 99 S. Ct. at 650-51. After all, the lead plaintiff in RNC had *only* BIA programs in its direct cost base; the lead plaintiff would have lacked standing to challenge IHS contracts and contracting policies permitting use of the OMB A-87 methodology. Similarly, RNC could not be a class member in this action, as RNC had no IHS programs.

Plaintiffs have asserted that “[w]hile 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.” (Dkt. #89 at 37 n. 22). With this statement,

Plaintiffs appear to be arguing the opposite of their argument thus far (i.e. that IHS was a de facto party who was always in RNC), by either (1) conceding that IHS was never a party or (2) at the very least, arguing that HHS was a necessary party to the original litigation, that Plaintiffs themselves failed to join. Yet Plaintiffs agreed to be part of a class comprised exclusively of BIA contractors. They agreed to a lead plaintiff whose factual situation dramatically differed from their own. RNC had more than 92% BIA contracts and no IHS contracts at all. In contrast, in fiscal years 1995-1997, IHS programs comprised only 38-46% of Tunica-Biloxi's direct cost base, and only 15-23% of RNSB's direct cost base. 2d Moberly Dec. ¶ 51. Plaintiffs could have stood on their rights to have a different class certified in that litigation, a class of contractors that had ISDA contracts with *both* BIA and IHS. At the very least, they could have taken steps to insist that IHS be joined as a necessary party under their purported theory of the case. Instead, they elected to take a "wait and see" attitude with respect to IHS.

Plaintiffs simply cannot have it both ways. By failing to join IHS in the first suit, plaintiffs evinced an intent to pursue IHS separately, an intent confirmed by the language reserving claims in the BIA settlement agreement. By choosing not to challenge IHS, Plaintiffs themselves eliminated any incentive IHS had to participate in the litigation against Interior. Plaintiffs' laxity in joining "all defendants possible", and the corresponding reduction in IHS's incentive to litigate in that action, is precisely why the Supreme Court warned courts to be skeptical of offensive uses collateral estoppel. See Parklane Hosiery, 439 U.S. at 329-30, 99 S. Ct. at 650-51; Jack Faucett, 744 F.2d at 133 (rejecting application of offensive collateral estoppel in class action). "[H]owever strong may be the concerns with judicial expediency, a court cannot ignore the relevant legal principles which, in the context of offensive estoppel, establish certain parameters within which the district court must exercise its discretion." Jack Faucett, 733 F.2d at 133.

3. Collateral Estoppel Would “Freeze the Law” in Contravention of Mendoza, and this Court Should Therefore Decline to Apply Collateral Estoppel

Even if the Court determines that all of the criteria of collateral estoppel have been met, this Court should nevertheless exercise its discretion and decline to apply the doctrine. Applying collateral estoppel in this case has the practical effect of “freezing the law” in direct contravention of Mendoza. See 464 U.S. at 162-63, 104 S. Ct. at 573-74 (reviving mutuality expressly to address “the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party”).¹⁶ Because the RNC litigation was a class action of BIA contractors, and Plaintiffs here aspire to bring a class action of IHS contractors, applying collateral estoppel in this case would have the direct practical effect of freezing the law relating to ISDA contracts and the use of OMB A-87 indirect cost rates. The Tenth Circuit’s opinion would be the only adjudication of the propriety of OMB A-87 rates in ISDA contracts, and no conflict would ever develop between the Circuits for the Supreme Court’s resolution.¹⁷

¹⁶ It should be noted, for example, that at the time of Mendoza, the Supreme Court had already abandoned the mutuality requirement. See Blonder-Tongue Labs. v. Univ. of Ill. Found., 402 U.S. 313, 328-29 (1971); see also Parklane Hosiery, 439 U.S. at 327, 99 S. Ct. at 649-650 (noting history of abandonment of mutuality requirement as founded in part on criticism that mutuality failed “to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost.”). Thus Mendoza reestablished mutuality to address the grave concern that the law could be frozen by a single adjudication. 464 U.S. at 162-63, 104 S. Ct. at 573-74. Because of the peculiar nature of the nation-wide class action, applying offensive collateral estoppel would have precisely the effect that the Supreme Court sought to eliminate when it resuscitated mutuality. Accordingly, this Court should decline to apply collateral estoppel in this case and permit conflict to develop.

¹⁷ Indeed, the Tenth Circuit’s decision is wrongly decided, as reflected by certain incorrect statements visible on the surface of the decision. For example, the Tenth Circuit’s opinion reflects grave errors in its understanding of how NBC operates as a cognizant agency. The opinion states that “OIG therefore set the indirect costs rate at 44.5% [] and agreed to pay plaintiff approximately \$336,318 in indirect costs for fiscal year 1989 []”. RNC, 112 F.3d at 1459. OIG (and its successor NBC) has absolutely no role in the formation of the ISDA contracts themselves. See 2d Moberly Dec. ¶¶ 44-45; see also 2d Compl. ¶ 12-13. The Tenth Circuit’s holding suggests that other agencies may shift their share of administrative costs to the

4. **Because of the Established Exception for a Change in Legal Climate, Even if the Threshold Conditions for Collateral Estoppel Were Satisfied, The Doctrine Does Not Bar the Court’s Review.**

There is a well-settled exception to collateral estoppel: a change in legal climate. Comm’r of Internal Revenue v. Sunnen, 333 U.S. 591, 599, 68 S. Ct. 715, 720 (1948)); see Fed. Labor Relations Auth. v. U.S. Dep’t of the Treasury, 884 F.2d 1446, 1456 (D.C. Cir. 1989) (“FLRA”); see also Graphic Comms. Intern. Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc., 843 F.2d 1490, 1493 (D.C. Cir. 1988) (“Issue preclusion does not apply when there has been an intervening change in legal principles”). Since the Tenth Circuit’s RNC decision, the relevant “legal atmosphere” relating to indirect costs and ISDA contracts has altered in two key respects: legislatively and judicially. See Bingaman v. Dep’t of the Treasury, 127 F.3d 1431, 1438 (Fed. Cir. 1997). Thus, even if this Court determines that the threshold requirements have been met, this Court should nonetheless decline to apply collateral estoppel to preclude the Secretary from litigating the propriety of using OMB A-87 indirect cost rates in IHS contracts. E.g., FLRA, 884 F.2d at 1456 (refusing to apply collateral estoppel against federal agency because of recent Supreme Court decision); Graphic Comms., 843 F.2d at 1493 (refusing to apply collateral estoppel against federal agency because of an intervening administrative ruling); cf. Western Oil & Gas Assoc. v. U.S. Environmental Protection Agency, 633 F.2d 803, 809 (9th Cir. 1980) (warning that “[c]ollateral estoppel is not to be applied mechanically”).

After the Tenth Circuit ruled against the BIA’s use of the OMB A-87 methodology in 1997, but prior to Plaintiffs’ filing of this suit against IHS, Congress clarified the statutory ambiguity discerned by the Tenth Circuit. Within approximately a year of the Tenth Circuit’s decision, Congress enacted a new ISDA provision, which provides:

ISDA programs, a proposition entirely antithetical to appropriations law and to the ISDA itself.

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.**

25 U.S.C. § 450j-2 (emphases added). There is no longer any ambiguity (if there ever was any) that ISDA programs shoulder their own indirect CSC, but, contrary to the Tenth Circuit's flawed logic, may not foot the bill for other programs that benefit from, but do not contribute to the indirect contract costs.¹⁸ Liquilux Gas Corp. v. Martin Gas Sales, Inc., 979 F.2d 887, 890 (1st Cir. 1992) (using "legislature's expression of what it understood itself to be doing" to determine whether new legislation is a clarification"); United States v. Montgomery County, 761 F.2d 998, 1003 (4th Cir. 1985) (recognizing that "[s]tatutes may be passed purely to make what was intended all along even more unmistakably clear").

It would be disingenuous to suggest that this provision is anything other than a clarification of the ISDA, or that it lacks clear Congressional intent to prevent precisely the theory of liability forwarded by Plaintiffs. See Dkt, # 89 at 38, n. 23. The provision was enacted soon after RNC, by

¹⁸ This is the law in effect at the time Plaintiffs filed this case, and thus governs the Court's analysis. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). While Plaintiffs question the constitutionality of § 450j-2, suggesting that the provision retroactively repudiates their contract rights, Mem. at 29, hampering their argument is the fact that the Tenth Circuit's decision rests upon an express holding of statutory ambiguity. RNC, 112 F.3d at 1460-61; see Landsgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (noting retroactivity concerns centering upon when "statute in question is unambiguous"). In addition, Plaintiffs did not file their complaint until years after Congress amended § 450j-2, and thus Congress could not have been deliberately seeking to repudiate their rights. Furthermore, Congress later enacted a similar provision that applies to BIA CSC, but unlike § 450j-2 which applies [b]efore, on, and after October 21, 1998", the new § 450j-3 applies strictly "on and after November 29, 1999," 25 U.S.C. § 450j-3 suggesting Congressional recognition of the still pending lawsuit in RNC.

its terms it applies retrospectively (“[b]efore, on, and after October 21, 1998”), and whose manifest purpose in the plain language is to forbid the type of indirect cost shifting that the Tenth Circuit deemed permissible. See 25 U.S.C. § 450j-2. 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.” See H.R. Rep. No. 106-609, at 110 (1998); see also id. at 133-34 (“Language is included under Indian Health Service, Administrative provisions. . . to require a proportional distribution of contract support costs.”). Congressional intent to prevent another decision like the Tenth Circuit’s could not be more transparent. This alone should suffice to create a change in legal atmosphere sufficient to trigger the relevant exception for a change in law.

In addition to legislative changes in the legal landscape rendering collateral estoppel inapplicable, “a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.” Sunnen, 333 U.S. at 600, 68 S.Ct. 715 (footnote omitted). The judicial decision need not be precisely on point to render collateral estoppel improper, but need only alter a method of viewing a legal or factual category. For example, FLRA was a Privacy Act case regarding the applicability of an exception for disclosures mandated by the Freedom of Information Act (FOIA). FLRA, 884 F.2d at 1448. The D.C. Circuit held that a recent Supreme Court FOIA decision had so redefined the legal nature of a disclosure interest that the court refused to apply collateral estoppel against a federal agency that had lost a similar Privacy Act claim in the Second Circuit. See id. at 1451-52, 1456. Similarly, in Faulkner v. Nat’l Geographic Enterprises, Inc., the Second Circuit refused to apply offensive collateral estoppel against a defendant who had previously lost on the same type of claim in the Eleventh Circuit. 409 F.3d 26, 37 (2d Cir. 2005). A recent Supreme Court decision had altered the relevant approach to considering when the Copyright Act protected material in a collective work from

reproduction. Id. “In our view, the [Supreme Court’s] approach so substantially departs from the [Eleventh Circuit’s] analysis that it represents an intervening change in law rendering application of collateral estoppel inappropriate.” Id.

Since the filing of this suit, the United States Supreme Court has unanimously clarified the nature of an ISDA contract: they are ordinary promises as enforceable as in a procurement contract. Cherokee, 543 U.S. at 638-40, 125 S. Ct. at 1178-79; see also Mem. at 2, 12. Prior to Cherokee, however, the essential character of the promises in an ISDA contract was unclear.¹⁹ This case was stayed pending the outcome of Cherokee for the very reason that the Supreme Court’s mode of analysis – and not only its ultimate holding – would impact how courts across the country would view ISDA contracts going forward. By effectively settling a longstanding dispute about the intrinsic nature of ISDA contracts, the Supreme Court’s decision qualifies as a change in legal climate sufficient to trigger the established exception to collateral estoppel.²⁰

5. The Court is Entitled to Reach the Secretary’s Contract Defenses, Even if Collateral Estoppel Applies.

As the Supreme Court held in Cherokee, the promises in an ISDA contract are binding like

¹⁹ Indeed, throughout this very litigation, Plaintiffs sporadically argue in favor of viewing the promises in ISDA contracts as unique. See, e.g., dkt. #89 at 29 (emphasizing ISDA contracts are formed “in the context of a trust responsibility”).

²⁰ The Tenth Circuit’s holding in RNC relies solely on BIA contracts from fiscal year 1989, and subsequent settlements only addressed years through 1994. Here, the IHS contracts at issue are for fiscal years 1995-1997, and thus suffice as “fresh” contracts appropriate for application of the change in law exception. Compare Bingaman, 127 F.3d at 1434-38 (upholding application of change in law exception to deny employee special benefits for 1993-1994, based on changed definition of benefit eligibility, despite employee’s prior success at securing benefits for 1989-1993, and where his employment duties had not materially changed) with Morgan v. Dep’t of Energy, 424 F.3d 1271 (Fed. Cir. 2005) (rejecting application of change in law exception under Whistleblower Protection Act, where definition of “protected disclosures” had changed since a previous proceeding, but defendants could not point to “fresh” disclosures made by plaintiff; rather, defendants continued to retaliate to “old” disclosures that had been adjudicated as protected in the prior proceeding).

the ordinary promises in a procurement contract. 543 U.S. 631, 639, 125 S. Ct. 1172, 1178-79. This means that the government is bound by its promises - but so are the Plaintiffs.²¹ Logically, therefore, contractual defenses are fully available on the question of whether, even if the indirect cost rates did not comply with the ISDA, Plaintiffs should be deemed to have waived their rights or be otherwise estopped from litigating the issue at this late point in time. Some of the available defenses are summarized in Defendants' renewed motion to dismiss (Dkt. # 82).

CONCLUSION

Plaintiffs have failed to demonstrate that the standards for collateral estoppel have been met, as there is want of mutuality, a different issue at stake, and there is a fundamental unfairness to Defendants. Even if this Court were to agree that the preconditions for collateral estoppel apply, this Court should nonetheless decline to apply the doctrine because (i) it would have the practical effect of "freezing the law" in contravention to the Supreme Court's efforts to eliminate that prospect in Mendoza, and (ii) because two significant clarifications or changes in law have taken place in the intervening years since the Tenth Circuit rendered its decision. Finally, even if this Court were to apply collateral estoppel, the case would not simply proceed to damages, as Defendants would be entitled to argue the full panoply of available contractual defenses, which they clearly could not have asserted in the RNC litigation, as that case, by its terms, did not involve IHS contracts. For the foregoing reasons, Plaintiffs' motion for partial summary judgment should be denied.

²¹ Plaintiffs claim that collateral estoppel precludes the Secretary of HHS from litigating the legality of using OMB A-87 indirect cost rates, and that this Court should therefore skip directly to a trial for damages. Mot. 2-3. On the illogic of that prayer for relief, however, this case would need to be stayed pending the resolution of the ongoing RNC litigation in the District of New Mexico relating to the RNC plaintiffs' equitable claims for renegotiated rates relating to fiscal years 1995 and forward. As yet, there is no final judgment in that case. Later adjudication in RNC could yield rates similar to those contested here, resulting in minimal or no damages.

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