

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

**TUNICA-BILOXI TRIBE OF LOUISIANA and)
RAMAH NAVAJO SCHOOL BOARD, INC.,)**

PLAINTIFFS,)

vs.)

UNITED STATES OF AMERICA, *et al.*,)

DEFENDANTS.)

**No.: 1:02CV02413
(RBW)
Magistrate Judge
Deborah A. Robinson**

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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- 10 *Cherokee Nation v. Leavitt*, Oral Argument, Transcript of Proceedings, Nov. 9,
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U.S. Department of Health & Human Services, ASMB C-10, <i>Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government: A Guide for State, Local and Indian Tribal Governments</i> ¶ 1.4 (1997)	81 exh. 9
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U.S. Department of Health & Human Services, Indian Health Service Circular No. 96-04: <i>Contract Support Costs</i>	81 exh. 14
U.S. Department of Health & Human Services, Indian Self-Determination Policy Memorandum No. 92-02: <i>Contract Support Cost Policy</i>	81 exh. 13
U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (GAO/RCED-99-150; June 1999)	21 att. 2
U.S. Office of Management & Budget, Circular A-87 (1981)	110 exh. 8
U.S. Office of Management & Budget, Circular A-87 (1995, as amended 1997) (excerpts)	81 exh. 7

ABBREVIATIONS

AFA	annual funding agreement(s)
BIA	Bureau of Indian Affairs, in the U.S. Department of the Interior
CDA	Contract Disputes Act, Public Law 95-563, 92 Stat. 2383 (1978), enacting 41 U.S.C. §§ 601 <i>et seq.</i> and amending parts of titles 5, 28, and 31, U.S.C.
<i>Cherokee</i>	<i>Cherokee Nation v. Leavitt</i> , 543 U.S. 631, 125 S. Ct. 1172 (2005)
CSC	contract support costs
FWCF	fixed-with-carry-forward, a type of indirect cost rate

HHS	U.S. Department of Health & Human Services
IDC	indirect contract support costs
IHS	Indian Health Service, in the U.S. Department of Health & Human Services
ISDA	Indian Self-Determination Act and Education Assistance Act of 1975, 25 U.S.C. §§ 450 <i>et seq.</i> , as amended
NBC	National Business Center, in the U.S. Department of the Interior
OIG	Office of the Inspector General, in the U.S. Department of the Interior
OMB	U.S. Office of Management and Budget
P/F	provisional/final, a type of indirect cost rate
<i>RNC v. Lujan</i>	<i>Ramah Navajo Chapter v. Lujan</i> , 112 F. 3d 1455 (1997)
RNSB	Ramah Navajo School Board, Inc.
<i>Seldovia</i>	<i>Appeal of Seldovia Village Tribe</i> , Interior Board of Contract Appeals, Nos. IBCA 3862 & 3863 (Oct. 20, 2003)
Tunica	Tunica-Biloxi Tribe of Louisiana

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Tunica-Biloxi Tribe of Louisiana (Tunica) and Ramah Navajo School Board, Inc. (RNSB) seek money damages and equitable relief for breaches of contract concerning Indian health care. The suit centers on the use of indirect cost rates to compute a component of mandated contract funding.

The requirements of the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450 *et seq.*, as amended, are made part of every ISDA contract by the mandatory Model Agreement. 25 U.S.C. § 450l(c), *Model Agreement*, sec. 1(a)(1).

This provision abolishes any distinction between the statute and the contract; all contract remedies may therefore be used to challenge a breach of the statute as well as the contract.¹ The statutory language is part of the terms and conditions of the agreement just as if it were actually written into the contractual document.²

Congress stated its intent that choosing self-determination not reduce program levels. Sen. Rep. 103-374, at 9, 12 (1994).³

The Indirect Cost Rate System and Determination of Contract Price

The Secretaries of Health and Human Services (HHS) and Interior both rely on indirect cost rates to implement ISDA's indirect contract support requirement under Office of

¹ "A construction of a contract provision which gives meaning to all its language is to be favored." *Tecon Corp. v. United States*, 411 F.2d 1262, 1264 (Ct. Cl. 1969).

² *See, e.g., Centex Corp. v. United States*, 395 F.3d 1283, 1292-1304 (Fed. Cir. 2005) (statutory rights at time of contract formation are incorporated).

³ *See also* Richard M. Nixon, Special Message to Congress on Indian Affairs (July 8, 1970) (Dkt. No. 21, Att. 11), proposing enactment of ISDA, at 4.

Management & Budget (OMB) Circular A-87 (Dkt. 81, Exh. 7; 2 C.F.R. part 255) by multiplying the rate times its share of the program base. An indirect cost rate, however, is not intended as a funding mechanism, OMB Circular A-87, Att. A, ¶ A.1; that function has been grafted onto the system by the defendant Secretaries, causing many problems.

The indirect cost rate is a ratio. The denominator consists of the direct costs of all programs administered by the contractor, and is commonly called “the direct cost base” or, simply, “the base.” The numerator is the amount that the contractor and National Business Center (NBC) agree, under the specific criteria of OMB Circular A-87, is the minimum amount of common costs necessary to run all programs in the base; it is called “the indirect cost pool” or “the pool.”

The Problem With the Base: Non-Paying Agencies

The indirect cost (IDC) pool is the parties’ agreement on the minimum amount necessary to operate the entire base. Many if not most other federal agencies have restrictions or prohibitions on use of their funds to pay administrative costs. But Tunica and RNSB need funds from other federal agencies to supplement their ISDA programs. If other agencies in the base do not pay indirect costs, the pool cannot be fully recovered. Without full recovery of the pool, programs in the base cannot be operated at the level of efficiency agreed to be necessary. The contractor simply cannot administer the programs in the base as expected unless it scales those programs back or supplements the pool from other resources to reach the agreed level. Defendants argue that Tunica and RNSB should simply not apply for those other programs. But that is unrealistic and contrary to Congressional intent. Supplemental programs are vital to Tunica’s and RNSB’s communities. ISDA’s requirement that the Secretary add the IDC

necessary to run ISDA programs at the Secretarial level to the contract price is not subject to a condition that the tribe not operate other programs.

Indirect cost pools are generally fixed. Pools do not fluctuate in proportion to changes in the base. Sen. Rep. 100-274, at 11 (1987); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (*RNC v. Lujan*). See also U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED, at 31 (GAO/RCED-99-150; June 1999) (GAO SHORTFALLS RPT.) (Dkt. No. 21, Att. 2).

But whether the pool is fixed or variable, failure to collect the full pool amount and therefore to spend at that agreed pool need level, hurts the operation of all programs in the base.

The Problem with the Pool: Carry-Forward Manipulations

Most ISDA contractors use fixed-with-carry-forward (FWCF) rates. They do so because the carry-forward option promises recovery of underpaid indirect costs through a future increase in rate. If the government pays too much, the contractor is not required to pay it back; rather, payback is accomplished by decreasing the rate in a future year. Typically, the subsequent period is the second year after the year covered by the rate, to allow time for auditing of actual costs.⁴

⁴ Another option called provisional/final rates (P/F) estimates a rate at the beginning of the fiscal period followed by ascertainment of the actual indirect costs incurred as compared with actual program (base) expenditures. If the resulting ratio is lower than the provisional rate, the contractor must pay back the difference to the government immediately; if the ratio is higher, the government owes the contractor the difference. For ISDA contractors, payback of an “over-recovery” is difficult and there is no record of any reimbursement by the government of an “under-recovery” for a P/F rate holder. Other rate options are not practical. Dkt. No. 110, exhibit 4 (3d Kerkmans Decl.), at 14-15 ¶¶ 38-40; Dkt. No. 110, exhibit 42 (Donham Decl.) ¶¶ 13-14.

FWCF rates, as administered by Defendants, systematically overstate contractor over-recoveries and understate contractor under-recoveries, thereby depressing indirect cost rates and, consequently, the contract price for indirect costs. Defendants accomplish this depression of rates by:

(1) double billing contractors for perceived over-recoveries of indirect costs, reducing the rate (hence the contract payment) in the next rate cycle (two years hence) sufficiently to fully offset the supposed over-recovery, but then nevertheless again subtracting the same amount in rate calculations in the subsequent rate cycle (four years hence); and, at the same time,

(2) ignoring most contractor under-recoveries, which far from being double-counted, are characterized as “shortfalls” and excluded entirely from future rates or recoveries.⁵

Together and alone, these manipulations violate the directive that no agency shall make “other adverse adjustment[s] to any future years’ rate indirect cost rate or amount for such tribal organization nor shall any agency seek to collect such shortfall from the tribal organization”. 25 U.S.C. § 450j-1(d)(1) and (2).

The Defenses

Defendants in their Memorandum of Points and Authorities in Support of Motion to Dismiss and for Summary Judgment (Dkt. No. 111) (*Def. Memo*) raise a potpourri of technical and equitable defenses to these contract claims. Most of these defenses were never raised by the contracting officer who denied the claims at the administrative level; hence, they are unavailable

⁵ In 1995, 1996, and 1997, RNSB also suffered from the illegal carry-forward of P.L. 100-297, school administration funds. *See* 25 U.S.C. § 2506(c).

to the government at this stage. Others were denied in earlier litigation between the United States and class representatives, litigation that binds the parties and precludes their assertion here. The defenses of waiver, estoppel, acquiescence, standing, and ripeness are thus unavailable to Defendants or have been resolved against them. They do not require reexamination and if re-examined they should be denied.

And if the defenses were available, each Secretary as a fiduciary was under an obligation to disclose fully their operation and effect. 76 Am. Jur. 2d, *Trusts* §§ 318, 322 (1975).

Defendants would limit jurisdiction to the Contract Disputes Act (CDA) under ISDA's jurisdictional provision, 25 U.S.C. § 450m-1. *Def. Memo.* 17.⁶ But 25 U.S.C. § 450m-1(a) clearly and explicitly provides further jurisdiction, including equitable jurisdiction, not available under the CDA, as this Circuit has expressly held. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1341 n. 1, 1344, 1352 (D.C. Cir. 1996) (ISDA contractor entitled to injunctive relief under § 450m-1(a) and Administrative Procedures Act; no mention of Contract Disputes Act or exhaustion).

Defendants repeatedly argue that Tunica and RNSB are attempting to shift the costs of other programs to the Indian Health Service (IHS). *Def. Memo.* 28-47, especially 37, 39, 46. But these costs are common costs, not just the costs of other programs. They are IHS costs as well, and should be so recognized under controlling precedent in this Circuit, *Arizona v. Thompson*, 281 F.3d 248, 255 & n. 11 (D.C. Cir. 2002) (common costs may be assumed by a primary program or funding source).

⁶ In its amended opinion (Dkt. No. 48), the Court addressed only Plaintiffs' claims for money damages. It did not address the claims for injunctive and declaratory relief.

For 1998 forward (the “cap years”), the defense relies on a loosely worded proviso, 25 U.S.C. § 450j-1(b). The proviso limits the Secretary’s authority to provide funds to discharge the contract obligation set by § 450j-1(g). It does not limit the Secretary’s contract authority to obligate funds. Defendants’ expansive reading of this proviso is unsupported by legislative text or history. When Congress intends to limit authority to obligate funds, it uses much more precise limitations. Meanwhile, 25 U.S.C. § 450j(c) applies only to future years before program appropriations have been enacted.

Finally, Defendants assert subsequent actions by Congress in (1) segregating a not-to-exceed appropriation for contract support in years after 1997 and (2) passing a provision in 1998 that can (but need not) be read to forbid contract support costs (CSC) payments altogether. While those subsequent Congressional actions do present unresolved issues as to years from 1998 forward, under ordinary contract law principles those issues should be resolved in Tunica and RNSB’s favor as well. In any case, they do not control the prior years before appropriation caps, 1995, 1996, and 1997. Those years are controlled by *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005) (*Cherokee*) (retroactive alteration of contract price violates *United States v. Winstar*, 518 U.S. 839, 116 S.Ct. 2432 (1996)).

The overall defense philosophy, expressed at *Def. Memo. 2*, is that the Congressional purpose behind ISDA was to force Indian tribes to make hard choices. That is simply not so. The Secretaries’ own regulations state that the contractibility of programs is to be encouraged, not discouraged. 25 C.F.R. § 900.3(8). See James T. McIntyre, Jr., Director, Office of Management & Budget, letter to Cecil D. Andrus, Secretary of the Interior (April 13, 1978), Exhibit 1 to this Opposition. But from the outset the IHS has resisted self-determination

contracting.⁷ The defense of this action continues that resistance. *See In re Cherokee Nation*, IBCA Nos. 3877–79, 99–2 BCA ¶ 30462, 1999 WL 440045*8, *reconsideration denied*, 01–1 BCA ¶ 31,349, 2001 WL 283245 (Exhibit 2 to this Opposition), *affirmed sub nom. Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), *affirmed sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005).

Plaintiffs’ Response to Defenses

The computation of Tunica’s and RNSB’s indirect contract support resting as it does on an accounting system never intended to be used to calculate a contract price fails to meet the statute’s commands regarding this category of required funding in 25 U.S.C. §§ 450j-1(a)(2)-(3) and (g). In fact, unless reformed, the present system makes calculation of the proper price impossible. The controlling decision of the Tenth Circuit in *RNC v. Lujan* requires this Court to order reform of the system.

Beyond inclusion of non-paying programs in the base, the rate is further depressed by Defendants’ manipulations of carry-forwards. Double dipping reduces the contract price twice for a single over-recovery. The unauthorized characterization of most under-recoveries as “shortfalls” not to be included in carry-forward calculations prevents contractors from collecting most under-recoveries through increased future rates.

Likewise, the controlling decision in *Cherokee*, 543 U.S. at 641-43, supersedes all contrary generalizations Defendants may draw from prior precedent. The proper analysis of

⁷ “Despite [ISDA’s] successes, the implementation of the act has consistently been plagued by an oppressive Federal bureaucracy.” 140 Cong. Rec. S4554-03, 1994 WL 139982*43 (daily ed., Apr. 20, 1994) (statement of Sen. McCain on introducing what became the 1994 amendments in the Senate).

Cherokee shows the existence of contract authority in the defendant Secretaries to bind the United States to indirect CSC contract obligations for current years exceeding appropriations.

Defendants rely on 25 U.S.C. § 450j-2 enacted through an appropriations act in 1998 for the sweeping proposition that Congress reversed the *Ramah* decision. This is untrue as a matter of legislative language or history.

The waiver argument assumes, incorrectly, that the parties are at arms-length. In fact, the government is a trustee⁸ and Tunica and RNSB are beneficiaries to whom the trustee owes the highest level of care and fair dealing. By imposing a rate and a contract price less than that commanded by the statute, and by failing to explain the effects of signing such agreements, Defendants have breached their duty as trustee and cannot profit from that breach. Indeed, case law directly on point binding on Defendants so holds. *Appeal of Seldovia Village Tribe*, Interior Board of Contract Appeals, Nos. IBCA 3862 & 3863 (Oct. 20, 2003) (*Seldovia*) (Dkt. No. 85, exhibit 1). In a carefully reasoned opinion, the Board rejected IHS' argument that the tribe's legal entitlement to CSC could be limited to the amount recited in the AFA.

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

STATUTORY BACKGROUND

Recognizing the profound failure of federal administration of trust responsibilities to Indian people, the Congress of the United States passed ISDA. Congress considered a number of

⁸ This Court has acknowledged its awareness of the sensitive nature of the service at the heart of this case by holding that “[t]he ISDA expressly acknowledges ‘the Federal government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people []’ 25 U.S.C. § 450(a)(1). These words of the statute at a minimum imply the existence of a trust relationship between the United States and Indian people in those areas covered by the statute.” Amd. Opinion (Dkt. No. 48), at 37.

funding mechanisms and settled upon contracts as most binding and enforceable.⁹ Subsequent judicial opinions and congressional history amply document the reluctance or inability of federal agencies to surrender administrative functions and funding. *See, e.g., Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338, 1341-42 (D.C. Cir. 1996) (system for distributing inadequate contract support cost funding was arbitrary and failed to conform to ISDA purposes); *RNC v. Lujan*, 112 F.3d, at 1462-1463 (federal agencies consistently failed to fully fund tribal indirect costs); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Leavitt*, 408 F.Supp.2d 1073, 1076 (D. Ore. 2005) (ISDA’s mandatory provisions were “added to overcome the Secretary [of Health & Human Service]’s bureaucratic recalcitrance, systematic violations of self-determination contractors’ rights, and consistent failures over the years to administer self-determination contracts in conformity with the law” (internal editing omitted)).

After more than a decade of increasing resistance to ISDA by the IHS and Bureau of Indian Affairs (BIA), Congress in 1988 passed comprehensive amendments, Public Law 100-472. These amendments created:

- A new category of mandatory funding for contract support costs, both indirect and direct, 25 U.S.C. § 450j-1(a)(2) through (5);
- A command that the Secretary “shall add” to each ISDA contract the “full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]”; and
- A remedial section conferring judicial power on this Court to enforce the provisions of ISDA contracts under the Contract Disputes Act, and giving the Court independent authority to award equitable relief, 25 U.S.C. § 450m-1.

⁹ *See generally* Sen. Rep. No. 100-274, at 19 (1987); *Cherokee*, 543 U.S. at 632 (“The Act uses ‘contract’ 426 times to describe the nature of the Government’s promise, and ‘contract’ normally refers to a promise for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty” (internal editing omitted).)

In 1994, because of continuing resistance from the IHS and BIA, Congress enacted another broad set of amendments, Public Law 103-413.¹⁰ This time Congress inserted into ISDA:

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

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

- The United States is the contracting partner in every ISDA contract, *Model Agreement* sec. 1(a)(1);
- The provisions of Title I of ISDA (25 U.S.C. §§ 450 et seq.) are incorporated into every ISDA contract, *id.*;
- ISDA and any contract under it are to be liberally construed for the benefit of the contractor, *Model Agreement*, sec. 1(a)(2);
- The funding amount of every ISDA contract “shall not be less than the applicable amount determined pursuant to [25 U.S.C. § 450j-1(a)].” *Model Agreement*, sec. 1(b)(4); and
- The provisions of the Model Agreement may not be modified without the contractor’s informed, voluntary written consent. *Model Agreement*, sec. 1(e)(d)(A).

It is inappropriate for the government in this context to ask this Court to excuse its contractual obligations on equitable grounds. As the Supreme Court said in *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S.Ct. 1049 (1942), “In carrying out its treaty obligations with the Indian tribes, the government is something more than a mere contracting party.” At the very least, it should not be held to a lower standard than it must observe with other federal contractors.

¹⁰ See generally Sen. Rep. No. 103-374 (1994).

ARGUMENT

I. THE RATE-MAKING SYSTEM AS APPLIED HERE VIOLATES THE INDIAN SELF-DETERMINATION ACT.

A. The Central Purpose of Contract Support Costs is to Allow Tribes to Operate Their Own Health Programs Without Diminishing Program Services.

At the most fundamental level, the A-87 system as applied by Defendants does not comply with the 1988 amendments to ISDA and the Model Agreement, since it does not produce dollar amounts of CSC meeting the command of 25 U.S.C. § 450j-1(a)(2)-(3) and (g) to add full CSC sufficient to operate the contracted program at the Secretarial level. *RNC v. Lujan*, 112 F.3d at 1463; *Second Amended Complaint* (Dkt. No. 11) ¶¶ 1-4, 14-25.

CSC funds are not merely incidental, gratuitous, or surplus funds added to the amounts that [the agency] would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right to them is clearly contractual as well as statutory.

Appeals of Mississippi Band of Choctaw Indians, Interior Board of Contract Appeals, Nos. IBCA 4711 through 4715 (Apr. 14, 2006), Exhibit 3 to this Opposition.

Congress specifically amended ISDA in 1988 to address the failure of the BIA and the IHS to pay the indirect costs associated with ISDA contracts, explaining its intent as follows:

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

Sen. Rep. No. 100-274, at 12 (1987). *See also id.* at 16, 30.

In 1994, Congress in Public Law 103-413 removed most of the agencies' rule-making

authority, 25 U.S.C. § 450k, and re-emphasized that payment of full CSC is required to ensure delivery of the Secretarial program level of service:

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

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

Congress mandated the Model Agreement that same year, commenting:

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

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

In 1997, as noted in *Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment* ("*Plf. Memo.*") at 8, IHS told Congress:

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

See *Plf. Memo.*, exhibit 30, at 5-6. Despite this and despite the ruling in *RNC v. Lujan*, the IHS

¹¹ Senate Reports 100-274 and 103-374 are not "selectively quoted." See *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (*Oglala*), cert. denied, 530 U.S. 1203, 120 S. Ct. 2196 (2000). The Court's attention is invited to the full reports, the tenor of which, Plaintiffs submit, is entirely consistent with the quotations here set out.

resists the statutory command to add full funding.

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

But “reasonable” and “allowable” are carefully defined, including in OMB Circular A-87.¹² If a cost is reasonable and allowable, the Secretary must include it in the contract support cost amount. Conversely, if it is not reasonable or it is not allowable, it is not included in that amount. There is no discretion about it: if it meets the definition, it must be included; if it does not, it cannot be included. There may be room for discussion about whether a particular cost is reasonable or is allowable. But that debate about a particular cost does not give the Secretary general discretion to deviate from the statutory command of adding to the contract the full CSC amount set out at 25 U.S.C. § 450j-1(a)(2). *See RNC v. Lujan*, 112 F.3d at 1463 n. 8 & acc. text.

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

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

... By including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to plaintiff to cover the indirect costs pool and thereby deprived plaintiff of full indirect costs funding for fiscal year 1989.

112 F. 3d at 1463. This is exactly parallel to what is pled in the Second Amended Complaint

¹² OMB Circular A-87, Att. A, ¶¶ C.1, C.2 (Dkt. 81, Exh. 7, at 9-11). Attachment B to Circular A-87 provides principles to be applied in establishing the allowability or unallowability of 43 specific categories of costs. 2 C.F.R. part 225, appendix B.

¶¶ 1-4, 14-25. In *RNC v. Lujan* as here the government argued that Congress was keenly aware of the OMB indirect cost rate system and endorsed its continued use. The Court rejected the government's contention. See *RNC v. Lujan*, 112 F.3d at 1462.

Thus the A-87 rate-making system *as applied* to determine ISDA indirect contract support entitlements conflicts with ISDA's commands regarding full funding and payment of indirect CSC.

C. The Tenth Circuit's Logic and Analysis in *RNC v. Lujan* Are Persuasive and the Holding is Issue Preclusive.

Not only are the Tenth Circuit's logic and analysis in *RNC v. Lujan* persuasive, but *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575 (1984) and its companion case, *United States v. Mendoza*, 464 U.S. 154, 169, 104 S. Ct. 568 (1984), mandate that the government is collaterally estopped from relitigating the holding that its methodology violates ISDA.

Plaintiffs have already discussed *Stauffer* and *Mendoza* at length. *Plf. Memo.* 8-14. *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981) (*Stauffer I*) held against the government's interpretation of "authorized representative" as used in the Clean Air Act. In *United States v. Stauffer Chemical Co.*, 684 F.2d 1174 (6th Cir.1982) (*Stauffer II*), a Tennessee district court held the government was barred from relitigating. The Sixth Circuit came to the same result on the merits, Judge Jones concurring in the result but arguing that collateral estoppel made merits analysis unnecessary. The Supreme Court agreed with Judge Jones: the government may not have more than the one full and fair opportunity to litigate a discrete issue against the same party. It distinguished *Mendoza* where plaintiffs were not bound by an earlier decision.

Had the *RNC* class lost, each Plaintiff would have been precluded from suing the IHS on

the same claim. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S.Ct. 2794 (1984) (judgment in class action is binding on class members in any subsequent litigation.) The doctrine of mutual defensive collateral estoppel bars relitigation in a new forum of the issues already litigated in *RNC*.

Under ISDA, both the Secretary of the Interior and the Secretary of Health and Human Services contract as agents of the United States. 25 U.S.C. § 450l(c), *Model Agreement*, sec. 1(a)(1). Moreover, IHS was represented by counsel and participated in the first partial settlement of the *RNC* litigation. *Plf. Memo.* 11-12. *See, e.g., RNC v. Babbitt*, 50 F. Supp. 2d at 1099. It was fully able to step in had it decided its interests were not adequately defended and was thus a de facto party. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S.Ct. 907 (1940). *Accord, Mervin v. Federal Trade Commission*, 591 F.2d 821, 830 (D.C. Cir. 1978) (“[A] judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.”)

After full litigation through discovery and summary judgment motions, *RNC v. Lujan* has already found facts material to this action:

4. Indirect costs for ISDA contractors are generally fixed, not variable. Also, other federal agencies do not typically pay their fair share for indirect costs as determined by the OMB A-87 system. As a result of the inclusion of other federal agencies’ programs in the base, the indirect cost rate is reduced. Under the OMB Circular A-87 system followed by the Defendants, the BIA then applied the rate to its portion of the direct base each year.
5. Because other federal agencies are under statutory or regulatory restrictions as to supplemental payment of indirect costs for administration of their programs, the result of the BIA system including the rate-making negotiation pursuant to the OMB A-87 Circular was to chronically underfund *RNC* and other Class members in terms of their reimbursement of indirect costs.

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

RNC v. Babbitt, 50 F. Supp. 2d at 1097. Defendants are collaterally estopped from challenging these findings.

II. COMMON COSTS THAT BENEFIT I.S.D.A. PROGRAMS ARE ATTRIBUTABLE TO THOSE I.S.D.A. PROGRAMS.

Defendants repeatedly argue that Tunica and RNSB are attempting to shift the costs of other programs to the IHS. *Def. Memo.* 28-47, especially 37, 39, 46. But these costs are not just the costs of other programs. *By the parties’ agreement, they are IHS costs as well.* The common costs at issue here directly benefit Tunica’s and RNSB’s IHS programs. That they also benefit other programs does not change the fact that they are within the definitions and requirements of 25 U.S.C. § 450j-1(a)(2). *See Arizona v. Thompson*, 281 F.3d 248, 255 (D.C. Cir. 2002). OMB Circular A-87 does not require the allocation of common costs among all programs: allocation of common costs to benefiting programs is an accounting tool; it is not, like 25 U.S.C. §§ 450j-1(a)(2) and (g), a statutory command.¹³ *See id.* at 256. *Accord, Nebraska v. U.S. Dep’t of Health & Human Services*, 340 F. Supp. 2d 1, 4, 20 (D.D.C. 2004), *vacated on other grounds*, 435 F.3d 326 (D.C. Cir. 2006) (A-87 does not require allocation of common costs to all benefiting

¹³ And indeed, Defendants purport to recognize that “[i]f a statute passed by Congress prescribes policies or procedures that differ from those in the Circular, the provisions of the statute govern.” U.S. Department of Health & Human Services, ASMB C-10, *Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Agreements with the Federal Government: A Guide for State, Local and Indian Tribal Governments* ¶ 1.4 (1997) (Dkt. No. 81, exhibit 9).

programs; State's allocation of common training costs to single program upheld). This cost-shifting argument also was rejected by the Tenth Circuit in *RNC v. Lujan*, 113 F.3d at 1459.

Contrary to Defendants' contention, full payment of indirect CSC will not result in ISDA funds being expended on activities that benefit only non-ISDA programs. Rather, full payment of indirect CSC will result in ISDA funds being spent on activities that benefit ISDA programs and simultaneously benefit the other programs. Indeed, to the extent that indirect cost pools are generally fixed, the indirect costs that some other programs do pay benefit the ISDA programs and in effect subsidize them.¹⁴ And, if the other programs did not exist, the ISDA program would still incur the same expenses.

III. FAILURE TO RECOVER INDIRECT COSTS HARMS ALL THE CONTRACTOR'S PROGRAMS.

RNC v. Lujan, 112 F.3d at 1463, holds the obvious: the entire indirect cost pool must be recovered to allow an ISDA contractor to administer the ISDA programs in the base properly. When the entire pool is not recovered, administration of every program in the base is impaired. All programs in the base suffer when the common costs in the indirect cost pool—agreed to be the minimum costs necessary to administer all programs in the direct cost base—are not actually recovered and therefore not expended for administration. This is the essential material fact.

Defendants ignore this truth and attack only the finding—accepted by the U.S. Congress, the General Accounting Office, the Tenth Circuit Court of Appeals, and the U.S. District Court

¹⁴ Most ISDA contractors, like Tunica and RNSB, receive the majority of the funds in their direct cost bases from IHS and BIA ISDA contracts. Dkt. No. 110, exhibit 10 (Demaray Depo.) 168:12 to 169:21; Dkt. No. 110, exhibit 31 (list of tribes showing total federal funds received, BIA funds received, and IHS funds received). Defendants' pie charts, *Def. Memo.* 44, focusing on only one of the two ISDA funding agencies, are thus misleading. It is the obligations of the United States that are at issue in this case.

for New Mexico on remand from *RNC v. Lujan*—that for most contractors, the indirect cost pool is generally fixed. They argue that indirect costs are mostly variable, attempting without success to create a genuine issue with respect to a fact that is not material to the outcome of Plaintiffs’ motion.¹⁵

Because of economies of scale and the nature of their programs, most ISDA contractors over time exhibit fairly steady indirect cost pools. Under their ISDA contracts, tribes and non-profit tribal organizations operate hospitals, schools, clinics, and civil services, not businesses.¹⁶ They incur costs no matter whether programs and services are operated in the black. Unless the size or make-up of the direct cost base fluctuates widely, the indirect cost pool usually remains fixed or nearly so. Sen. Rep. 100–274, at 11 (1987); Dkt. No. 21, Att. 2 (GAO Report), at 29-30; Dkt. No. 110, exhibit 4 (3d Kerkmans Decl.), at 6 ¶ 14; Dkt. No. 110, exhibit 11 (Moberly Depo.) 72:16-20; Dkt. No. 110, exhibit 42 (Donham Decl.) ¶¶ 10-11.

As the Tenth Circuit put it, it is because the indirect cost pool is not readily allocable that it tends to be more fixed than variable. *RNC v. Lujan*, 112 F.3d at 1461. If a cost were readily allocable, it would not be in the indirect cost pool; rather, it would be a direct cost, part of the

¹⁵ The substantive law identifies which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law preclude summary judgment. Factual disputes that are irrelevant or unnecessary are ignored. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). *Accord, Fox v. Giaccia*, 424 F. Supp. 2d 1, 5 (D.D.C. 2006). The party opposing summary judgment must establish more than the “mere existence of a scintilla of evidence in support of [its] position”. *Anderson, supra*, 477 U.S. at 252 (internal editing omitted).

¹⁶ CPA John Donham, one of Plaintiffs’ experts, made this point in his deposition. He noted that Mr. Wilkins’ report, discussed *infra*, was written from a business perspective, not a government cost accounting perspective. Unlike businesses, governments must operate basic governmental services regardless of revenues, he noted. This contributes to the generally fixed nature of their administrative costs. *See* Exhibit 4 hereto, at 123:8 to 129:11.

direct cost base. Dkt. No. 110, exhibit 11 (Moberly Depo.) 62:7-24, 73:12 to 74:7. Thus, a cost that is entirely variable (*i.e.*, only incurred when a new program is added and disappearing if an existing program is dropped) is not properly assigned to the indirect cost pool. *Id.* As NBC's designated representative, Deborah A. Moberly, correctly testified, a cost that varies directly with program costs is a direct cost, which would not properly be in the indirect cost pool at all. *Id.*

Defendants' principal weapon in this misguided effort is a flawed and confusing report by Charles L. Wilkins. Dkt. No. 111, exhibit 5. Mr. Wilkins' final conclusion, after 16 pages of discussion, is that "Plaintiffs' indirect costs, considered as a whole, are variable." *Id.* at 16. But Mr. Wilkins lists no experience with indirect cost rates or with ISDA. This may account for fundamental errors in his analysis.

First, Mr. Wilkins asserts that "[f]ixed costs are costs in which there is little correlation between the indirect costs and revenue." Dkt. No. 111, exhibit 5, at 4. And, "[v]ariable costs will generally vary in a much closer, more linear relationship with revenue changes." *Id.* at 6. But indirect cost rates in the ISDA context have nothing to do with revenue; they are determined by comparing indirect costs with direct costs, not with revenues.¹⁷ NBC in calculating rates assumes recovery of all indirect costs. Thus, Mr. Wilkins' charts that compare Tunica's and RNSB's total revenues with their expenditures for indirect costs, *id.* at 11, 14, compare apples with oranges. *See also* 4th Burke Decl. (Exhibit 6 hereto) ¶ 8.

Second, Mr. Wilkins sets up a straw man by mischaracterizing Plaintiffs' arguments. He

¹⁷ "Contractors may opt to use one of three bases: total salaries and wages with or without fringe benefits or total modified direct costs less capital expenditures and pass-through." Dkt. No. 95, exhibit DD (2d Moberly Decl.), at 4 ¶ 14. Each of the permissible bases is composed of expenditures; none is composed of revenues.

asserts that “Plaintiffs Allege that their Indirect Costs are Totally Fixed.” *Id.* at 9. But nowhere have Plaintiffs asserted that their indirect costs are “totally fixed”. Nor did the plaintiff class of ISDA contractors in the related case, *RNC v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), on remand *sub nom. RNC v. Kempthorne*, D.N.M. CIV 90-0957 LH, ever make such an assertion. Nor have these ISDA contractors ever argued that large swings in program expenditures do not cause significant changes in indirect cost pools. Dkt. No. 111, exhibit 5, at 4.

To support his contention that Plaintiffs’ indirect costs are generally variable in linear proportion to revenues,¹⁸ Mr. Wilkins produces charts. *Id.* at 11, 14. His charts show precisely the opposite of what he contends. Those charts show fourteen year-to-year changes, covering 1995 through 2003 for Tunica and 1995 through 2002 for RNSB. Four times, revenues went up but indirect costs went down. Six other times, revenues went down, but indirect costs went up. In only four of the 14 changes, did revenues and indirect costs move in the same direction. *See* Exhibit 5 to this Opposition. Mr. Wilkins’ contention that Plaintiffs’ indirect costs considered as a whole are correlated with Plaintiffs’ revenues is disproved by his own charts.¹⁹

¹⁸ Mr. Wilkins compounds our confusion by telling us that fixed costs also vary with revenue. *Id.* at 12 (“If Tunica’s indirect costs were fixed, their actual indirect costs would have remained relatively constant during the periods, *proportional with revenue activity*”; emphasis added).

¹⁹ *Compare* Mr. Wilkins’ report, at 9 n. 3, repeated at 13 n. 6: “To determine the specific category of semi-fixed or semi-variable I would need to have a more detailed understanding of the nature of each element of costs. However, in assessing the relationship of these two categories relative to changes in revenue, they both act in a similar fashion – they typically increase as revenue increases and they typically decrease as revenue decreases.” Tunica’s did not.

Even accepting his selection of revenues as the measure for determining the variability of indirect costs, his misinterpretation of Plaintiffs’ financial data undermines his central contention. *See* 4th Declaration of Douglas C. Burke, ¶¶ 4-5, 7 & exh. 1 (Exhibit 6 to this Opposition), which shows that Mr. Wilkins based his conclusions on incorrect financial

The variability of indirect costs should be measured against the program expenditures, the direct cost base, not against revenues. That measurement confirms that indirect costs are more fixed than variable. Tunica's indirect pool rose from roughly \$694,000 in 1998 to roughly \$915,000 in 2004, while its direct cost base rose from roughly \$1,845,000 in 1998 to roughly \$3,383,000 in 2004. *See* Dkt. No. 116, 3d Burke Decl. suppl. exhibit 9, 1998-2003 proposal, at 8-9 & 2006 proposal, at 8; 4th Burke Decl. (Exhibit 6 to this Opposition), ¶ 9 & exhibit 3. In round terms, the program base rose by \$1,555,000, while the indirect cost pool rose by only \$200,000, confirming that Plaintiffs' assertion that indirect costs are *generally* fixed in relation to the base. Said another way, Tunica's program base rose (largely because of new tribal programs) by 84% while its indirect cost pool rose by only 28.5%. A better example of the generally fixed nature of indirect costs would be hard to imagine.

Mr. Wilkins sees variable costs (*i.e.*, variable with respect to revenue changes) when Tunica's indirect costs change even though revenues don't change or they change in the opposite direction. When he observes that RNSB's costs don't change at all, he still sees variable costs.²⁰ In the years examined by Mr. Wilkins, Ramah's indirect costs remained virtually the same, while Tunica's varied, *but not in response to changes in revenues*. Again, Mr. Wilkins' point is disproved by the data he cites.

information. Mr. Burke's corrected data is graphed in exhibit 2 to his declaration. The pronounced increase in revenues from 1998 to 2004 is accompanied by a minimal increase in indirect cost expenditures. The relationship between indirect costs and revenues is certainly not "linear".

²⁰ *See id.* at 13: "While the relative consistency in RNSB's indirect costs compared to revenue may give the appearance that they are fixed, another explanation is that the constant nature of RNSB's revenue does not facilitate the need for fluctuation in their indirect costs. [*Sic.*]"

Neither RNSB nor Tunica recovered their entire indirect cost pools. They therefore could not maintain efficient program administration without diminishing program services or subsidizing indirect costs from other resources. RNSB incurred deficits to cover these shortfalls. 2d Martinez Decl. (Dkt. No. 110, exhibit 3) ¶¶ 10-12.

Whether fixed or variable, all IDC in the pool must be collected or the ISDA program and every other program in the base suffers. Mr. Wilkins' attempt to refute the generally fixed nature of Plaintiffs' indirect cost pools fails because his data refute his conclusions and his comparisons of IDC costs to revenues are irrelevant. More importantly, the supposed variability he finds in the pool does not detract from the essential, material fact that the entire pool must be collected to operate the entire base. His evidence for the generally fixed nature of indirect costs does not meet the standard to create a genuine dispute but, even if it did, it is fundamentally immaterial. See 3d Martinez Decl. & 4th (5th) Burke Decl., Exhibits 20 & 21 hereto.

IV. THE SECRETARY'S CONTRACT AUTHORITY FOR INDIRECT CONTRACT SUPPORT COSTS PERMITS HIM TO BIND THE UNITED STATES IN ADVANCE OF APPROPRIATIONS.

Defendants repeatedly contend that "all funding under the ISDA is subject to the availability of appropriations", citing 25 U.S.C. §§ 450j(c) and 450j-1(b). *Def. Memo* 6, 23, 24, 27. Defendants' contention is wrong. Once a program appropriation is made, the corresponding CSC amount must be added. "A promise to pay, with a reserved right to deny or change the effect of that promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1878) (as quoted by Mr. Justice Breyer in *United States v. Winstar* (concurring) 518 U.S. 839, 913, 116 S.Ct. 2432 (1996)).

"Contract authority" is the term of art in federal appropriations law for authority in a

government official to bind the United States in advance of appropriations. The distinction between contract authority and expenditure authority is well recognized, beginning with the statutory definitions in the Budget Act, 2 U.S.C. § 622(2)(A)(iii):

The term “budget authority” means the Authority provided by Federal law to incur financial obligations, as follows: . . .

(iii) **contract authority**, which means the making of funds available for **obligation**, but not for **expenditure**

(Emphasis added.)

The Secretary of Health and Human Services (HHS) is given authority to enter ISDA contracts on behalf of the United States. The Secretary is also the paymaster who normally pays to contractors what is due under those contracts.

But his contract authority to bind the United States by executing ISDA contracts and his expenditure authority to fulfill ISDA contract obligations are not one and the same.

When the Secretary enters into an ISDA contract, pursuant to ISDA he exercises contract authority to obligate the United States to pay full CSC. The Secretarial program amount depends upon a sufficient appropriation but, once that program amount has been determined, the statute commands the addition of full CSC.

Only the Secretary’s role as paymaster is limited by the § 450j-1(b) proviso and its corollary in section 1(b)(4) of the Model Agreement.

Many cases, notably *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), cited twice with approval in *Cherokee*, 125 S. Ct. at 642-43, construing contracts issued pursuant to a remarkably parallel statutory mandate, turn on the distinction. *See, for example, United States v. Langston*, 118 U.S. 389, 394, 6 S.Ct. 1185, 1187 (1996) (simply because appropriation is not sufficient to pay on obligation of the United States does not mean the

obligation is abolished); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (Ct. Cl. 1997) (insufficient appropriations do not cancel government's debts or extinguish rights of other parties); *Gibney v. United States*, 114 Ct. Cl. 38, 51-52, (1996) (limitation on appropriations does not repeal or suspend existing statutory obligation); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) (contractor who is one of several to be paid from appropriation not chargeable with knowledge of its administration; his legal rights are not affected by expenditure of appropriation for other purposes); *Bath Iron Works v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1996) (judgment fund is appropriation from which contract debts of government are paid, regardless whether agency has the funds itself); *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1882) (persons contracting with government for partial services under general appropriations are not bound to know condition of appropriation account at Treasury or on contract book of Department); *Major Collins' Case*, 15 Ct. Cl. 22, 35 (1879) (government liabilities may be created without appropriation to pay them; payment depends on appropriation but liability is independent and can be enforced judicially).

Defendants are aware of the difference between contract authority and expenditure authority. A prime example of their awareness is their congressionally-barred insertion in Tunica's contracts for 1995-1998 (Dkt. No. 13, exhibit J, at 7 and 17) and for 2000 through 2003 (*id.*, exhibit K, at 7 and 15) of drastically divergent contract funding language. On each page 7,²¹ in Art. II.4, there appears the language set forth in section 1(b)(4) of the Model Agreement, 25 U.S.C. § 450l(c), the key wording of which is the "make available" clause in the first sentence. But on each page 17, in Art. V.5(H)(i), an unauthorized and radically different clause on the

²¹ Page references here are to the exhibit page numbers in the lower-right corner, not to the document pagination centered at the bottom of each page.

same subject substitutes the phrase “*there shall be obligated*” for the Model Agreement’s “*shall make available*”. Defendants may not by the simple expedient of writing their own rules into ISDA contracts substitute those rules for what Congress has imposed. And, of course, even were the insertions legitimate, the conflict thereby created within each contract must be resolved by application of the ambiguity rule in the Model Agreement. The development and insertion of the spurious clause by the Defendant agency is an admission of the distinction between “*shall be obligated*” and “*shall make available*”.²²

Cherokee does not explicitly reach the question of whether contract authority is conferred by ISDA “since Congress appropriated adequate unrestricted funds here . . .” *Id.* It is apparent, however, that ISDA does confer such. If it were otherwise the Anti-Deficiency Act would obviate any need for a provision such as 25 U.S.C. § 450j-1(b), which would be simply redundant, and which would be similarly redundant if 25 U.S.C. § 450j(c) had the scope claimed for it by Defendants. *In re St. Regis Mohawk Tribe*, Dept. of Health and Human Services, Departmental Appeal Board, No. A-02-12, Decision No. 1808 (Jan. 17, 2002) (Exhibit 7 to this Opposition), a decision binding on HHS, addressed this issue. Citing *Wetsel-Oviatt, supra*, the Board rejected arguments that 25 U.S.C. § 450j(c), the 25 U.S.C. § 450j-1(b) proviso, or the Anti-Deficiency Act barred payment in advance of appropriations under an existing ISDA contract.

Defendants cite the Federal Circuit’s 1999 decision in *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t*, 194 F.3d 1374, 1378 (*Oglala*), *cert. denied*, 530 U.S. 1203, 120 S. Ct. 2196

²² The same contrast is shown in Exhibit 8 to this Opposition, a collection of 51 statutes containing language of obligation as contrasted with the proviso’s language of expenditure. Of particular note is 25 U.S.C. § 1658, a measure enacted by the same Congress in the same session that enacted the proviso. *And see* 25 U.S.C. § 2008(j)(2).

(2000), to support their contention that the price term in an ISDA contract can be decreased if the Secretary receives insufficient appropriations to liquidate the contract obligation. *Def. Memo.* 24, 27. But *Cherokee* casts this Federal Circuit decision in doubt. *Oglala* reversed a decision of the Interior Board of Contract Appeals (IBCA) in *Appeals of Alamo Navajo School Board, Inc. & Miccosukee Corp.*, No. 3463, 98-2 B.C.A. 29,832, 1997 WL 759441 (1997) (*Alamo/Miccosukee*), Exhibit 9 hereto. See *Oglala*, 194 F.3d at 1377 n. 1 & acc. text.

The Supreme Court in *Cherokee* cites the IBCA *Alamo/Miccosukee* ruling without mentioning that the decision was overturned by the Federal Circuit in *Oglala*. 543 U.S. at 645. The unusual omission suggests that the 53-page IBCA decision is better reasoned than the *Oglala* author's bootstrapping of his dissent in *American Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1379-81 (Fed. Cir. 1999) (*en banc*). This suggestion is supported by Justice Breyer's remarks addressing Government counsel in the *Cherokee* oral argument. Transcript of Proceedings, *Cherokee* oral argument of November 9, 2004, at 48, Exhibit 10 to this Memorandum.

Plaintiffs' analysis that the ISDA confers contract authority as to CSC and their contention that *Cherokee* confirms that analysis is the same conclusion reached by government contract authorities Ralph C. Nash & John Cibinic in *CHEROKEE NATION: MORE THAN MEETS THE EYE*, 19 Nash & Cibinic Report No. 29, at 4-5 (2005), Exhibit 11 to this Opposition (ISDA provides Secretaries "contract authority" to "enter into contracts incurring obligations . . . without the necessity of an appropriation").²³

²³ Nash and Cibinic are authors of the oft-cited "major treatise on government contracts." *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1373 (Fed. Cir. 2003). See also *United States v. Winstar*, 518 U.S. 839, 890 n. 36, 116 S.Ct. 2432 (1996) (citing the 3d edition of their treatise,

Section 450j(c).²⁴ 25 U.S.C. § 450j(c)(1) is a limitation on contract authority *only as to years for which an appropriation has not yet been made*. It is not a limit on the Secretary’s contract authority with respect to self-determination contracts generally. In fact, section 450j(c)(1) is a limit on the Secretary’s contract authority with respect *only to the out-years of multi-year or indefinite term contracts*. Its force is spent as to any year for which there has been an appropriation creating the Secretarial amount. See H. Rep. No. 93-1600, at 29, 1975 USCCAN 7775, 7790 (1975): “This discretionary authority provides for contracts over a year in length *but, as to years after the first year, the contract is more of a declaration of intent until sufficient appropriated funds have become available for the future years.*” (Emphasis added.) The Department understands the provision that way as well. Tunica’s contract, Dkt. No. 13, exhibit J, at 12, follows and incorporates this reading of 25 U.S.C. § 450j(c)(2). Paragraph 14 is entitled “*Successor Annual Funding Agreement*” and, referring to §450j(c)(2), states that *future* annual funding agreements (“AFAs”) may be negotiated prior to the end of the preceding AFA: “Except as provided in section . . . 450j(c)(2) [*sic, i.e., §450j(c)(1)(B)*] the funding for each such *successor* Annual Funding [agreement] shall only be reduced pursuant to section 106(b) of such

Federal Procurement Law); *Short Bros., PLC v. United States*, 65 Fed. Cl. 695, 775 (2005) (“Government contracts experts”).

²⁴ 25 U.S.C § 450j(c) in pertinent part reads:

Term of self-determination contracts; annual renegotiation

- (1) A self-determination contract shall be –
 - (A) For a term not to exceed three years in the case of other than mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and
 - (B) For a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations. . . .

Act (25 U.S.C. 450j-1(b)).” (Emphasis added.) This suit does not concern “successor” AFAs; it seeks payment of CSC for years in which program appropriations have already occurred for which the mandated contract support must be paid pursuant to 25 U.S.C. § 450j-1(g) and corresponding provisions in the Model Agreement.

Section § 450j-1(b). 25 U.S.C. § 450j-1(b) speaks to *provision* of funding, the liquidation of the contract debt by the Secretary pursuant to his or her *expenditure* authority, not to the debt itself created pursuant to contract authority.

Contract debt both takes precedence over non-contractual obligations and remains owing regardless of appropriations. Non-contracting tribes, unlike Plaintiffs and other contracting tribes, are thus without recourse once appropriations lapse. Section 450j-1(b) allows the Secretary to pay less to contracting tribes so that all tribes may be treated equally. It is not a limitation on the Secretary’s contract authority.

Caps. As the unanimous Supreme Court holds in *Cherokee*, citing *Ferris*, *supra*, 27 Ct. at 546, *Dougherty*, *supra*, 18 Ct. Cl. at 503, and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 & n. 9 (Ct Cl. 1980):

[A]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government **normally** cannot back out of a promise to pay on grounds of “insufficient appropriations,” even if the contract uses language such as “subject to the availability of appropriations,” and even if the agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. . . . “A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.”

543 U.S. at 637-638, 125 S. Ct. at 1177-1178 (emphasis added).

The segregation by Congress of a “capped” appropriation to the IHS for ISDA CSC in

1998 and subsequent years does nothing to change this longstanding rule, now confirmed by *Cherokee*. The appropriation for CSC is greater by several orders of magnitude than the contract debt owed to either Plaintiff for their CSC in each of those years. Such appropriations are qualitatively unlike an appropriation for a specific contract or project where the contractor may be charged with knowledge as in *Sutton v. United States*, 256 U.S. 575, 41 S. Ct. 563 (1921).

Cherokee, 543 U.S. at 642-643, points to several alternatives the government may use when its appropriations prove inadequate to pay contract debts:

[T]he law normally expects the Government to avoid [running out of money to pay its contracts], for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise.

For this passage, the Supreme Court cites *New York Airways, Inc. v. United States*, 369 F.2d 743, 747-748 (Ct. Cl. 1966); the Anti-Deficiency Act, 31 USC §§ 1341(a)(1)(A) and (B); the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, and the Judgment Fund, 31 U.S.C. § 1304, as well as the GAO Redbook, 2 U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-17 to 6-19 (2d ed. 1992).

The Supreme Court's citation of *New York Airways* is particularly significant. That case involved a statute very similar to ISDA in that it specified that contracts for mail services were to be "paid out of appropriations". The lawsuit arose because, as here, Congress cut appropriations but the contracted services had been performed. Further, the contract price for the contracts there was determined by a pre-set rate, much like the indirect cost rate used by the IHS to determine ISDA contractors' CSC needs. The citation is also significant because both the

reversed decision of the Tenth Circuit in *Cherokee*, 311 F.3d 1054, 1065-1066 (2002), and the Federal Circuit's decision in *Oglala*, 194 F.3d at 1379, had refused to recognize that the principles that governed the cap on helicopter subsidies at issue in *New York Airways* also govern the ISDA caps on CSC.²⁵

RNSB v. Babbitt is not to the contrary. The quotation cited by the Court, Amended Opinion, Dkt. No. 48, at 25, is ambiguous at best and clearly dicta. Caps were not at issue in that litigation.

So long as Congress does not amend the Model Agreement to state clearly that insufficiency of appropriations limits the United States' *liability*, as do the 51 statutes at Exhibit 8, mere inclusion in an appropriation act of a "not to exceed" amount does not alter the contract price nor the contract debt created by the Secretary's failure to pay the full contract price.²⁶

Secretarial Failure to Seek Adequate Appropriations. Where an agency has not sought adequate appropriations, unavailability of appropriations is no defense *regardless* of an exculpatory clause, unless that clause explicitly places on the contractor the burden of risk that the agency may not request adequate funding. *S.A. Healy v. United States*, 576 F.2d 299, 307 (1978); *C.H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976); *San Carlos Irrig. & Drainage Dist. v. United States*, 23 Cl. Ct. 276, 283 (1991). Defendant IHS has never sought an

²⁵ *Ramah Navajo Chapter v. Norton*, U.S.D.C. N.M. Civ. No 90-957, memorandum opinion & order (Aug. 31, 2006), Dkt. No. 111, exhibit 30, relies heavily on *Oglala*. See pp. 8-10. That decision will be appealed. (Mr. Gross, lead attorney for Plaintiffs in the instant action, is Class Counsel in that case.)

²⁶ Compare *Republic Airlines, Inc. v. United States*, 849 F.2d 1315 (10th Cir. 1988), where Congress in an appropriations act expressly amended a statute to remove contract authority previously conferred, a situation not presented in *New York Airways* or here.

appropriation sufficient to meet the need for indirect CSC of ISDA contract administration.²⁷

V. SUBSEQUENT LEGISLATION DID NOT ALTER THE UNITED STATES' OBLIGATION TO PAY FULL CONTRACT SUPPORT COSTS.

The Tenth Circuit Court of Appeals resolved any ambiguity in the mandatory full funding provisions of 25 U.S.C. § 450j-1(a) in Plaintiffs' favor in *RNC v. Lujan*, 112 F.3d 1455, but Defendants contend that by subsequent "clarifying" legislation at 25 U.S.C. § 450j-2,²⁸ a later Congress reversed the Court's resolution of that ambiguity.²⁹ On its face, the meaning and intent of § 450j-2 are not clear; the phrases "directly attributable" and "associated with" lack precision and are not explained by legislative history, as there is none.

Section 450j-2's literal requirement that no funds from any appropriation whatever,

²⁷ See excerpts from annual Justifications of Estimates submitted by the U.S. Department of Health & Human Services, Indian Health Service, to the congressional appropriations committees, collected in Exhibit 12 to this Opposition. See also Sen. Rept. No. 100-274, at 9, 1988 USCCAN, at 2628; GAO SHORTFALLS RPT. 34-35. Although the Secretary is required each year to formally report to Congress on deficiencies in contract support cost funding, 25 U.S.C. § 450j-1(c)(2), he has never done so. Dkt. No. 110, exhibit 19, at 3-4.

²⁸ Section 450j-2 provides: "Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act 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." The section was enacted as a proviso in the 919-page Omnibus Consolidated and Emergency Appropriations Act for FY 1999, Pub. L. 105-277, div. A, § 101(e) [title II], 112 Stat. 2681, 2681-280 (1998).

²⁹ Contrary to Defendants' contention, *Def. Memo.* 27 n. 8, § 450j-2, an appropriations rider, did not render the Tenth Circuit's decision in *RNC v. Lujan* "no longer good law." H.Rep. No. 105-609, at 57, refers only to the settlement of *RNC v. Lujan*, while *id.* at 110 is at best ambiguous because it does not recognize the common nature of indirect costs. *Arizona v. Thompson*, 281 F.3d 248, 255 (D.C. Cir. 2002). A more plausible reading is that § 450j-2 prohibits using IHS direct program moneys to pay other agencies' *direct* CSC. See *infra*, at 32.

including other agency appropriations, may ever be used to pay costs “associated with” other agencies is beyond draconian, it is absurd. Moreover, the posited mutually-exclusive dichotomy between common costs “directly attributable” to an ISDA contract and contract costs “associated with any entity other than the Indian Health Service” is not valid. *See Arizona v. Thompson*, 281 F.3d 248, 255 (D.C. Cir. 2002).³⁰

Whatever the true import of section 450j-2, giving it the scope Defendants claim for it would, in the guise of “clarification,” alter pre-existing law and contract terms for the years prior to fiscal 1999. Such alteration is not permissible. Congressional power to pass retroactive legislation is subject to strict contractual and Constitutional limits, *INS v. St. Cyr*, 533 U.S. 289, 315-317, 121 S. Ct. 2271 (2001). Its power to thereby impair vested contract rights is highly circumscribed, *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432 (1996), for the United States is bound to its contracts as much as a private party, and no party to a contract can unilaterally declare what the ambiguous terms of a contract mean. Well-settled rules are available to the courts for resolving such matters. *See, e.g., Javierre v. Central Altagracia*, 217 U.S. 502, 507, 30 S. Ct. 598 (1910) (burden on those “seeking to escape from a contract made by them on the ground of a condition subsequent, embodied in a proviso”); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) (a government-drawn exculpatory provision must be construed narrowly and strictly); *United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Cl. Ct. 1974) (contractor’s reasonable interpretation controls where Government

³⁰ On the one hand, Congress is said to have endorsed the indirect cost rate system, the essence of which is to pool common costs, *i.e.*, costs that are difficult to allocate. But every dollar in the indirect cost pool is “directly attributable” to every program in the base and every dollar in the pool is “associated with” every other dollar in the pool and, thus, with every program in the base. The ambiguity is resolved in favor of the contractor. 25 U.S.C. § 450l(c), *Model Agreement* sec. 1(a)(2).

drafted the contract); *Padbloc v. United States*, 161 Ct. Cl. 369, 376-77 (1963)(contracts not construed so that “one party was to be placed at the mercy of the other”); *Winstar, supra*; *Franconia Assoc. v. United States*, 536 U.S. 129, 122 S. Ct. 1993 (2002) (the United States does business on business terms).

The retroactive language would be an “impermissible repudiation” of contractual rights. *United States v. Winstar Corp.*, 518 U.S. 839, 924, 116 S. Ct. 2432 (1996) (Scalia, J., concurring). *See also Cherokee*, 543 U.S. at 646;125 S.Ct. at 1182; *Centex Corp.*, 395 F.3d at 1304-1306 (Government breached covenants of good faith and fair dealing by legislation retroactively depriving contractors of benefits of their contracts with Government); *Cuyahoga Metropolitan Housing Authority v. United States*, 57 Fed. Cl. 751, 777-782, 781 (2003) (appropriations rider targeting preexisting Government contract obligations to reduce outlays is impermissible breach of contract under *Winstar* for which Government is liable in damages).

Congress has the undoubted power to retroactively clarify genuine ambiguity in a prior regulatory enactment, *e.g.*, *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 380-381, 89 S.Ct. 1794 (1969) (regulation of broadcasters using public airwaves). But even in the regulatory area there is sometimes a close question how far “clarification” can go. “WHITE cannot retrospectively be made to assert BLACK.” *United States v. Montgomery Cty., Md.*, 761 F. 2d 998, 1003 (4th Cir. 1985). And in the field of contract, retroactivity is highly problematic. As in *Winstar*, 518 U.S. at 897-898, where there is concern with governmental self-interest, the legislative assessment is suspect and deference is not appropriate. If, as Defendants would have it, section 450j-2 is an implicit reversal of *RNC v. Lujan*, it crosses *Winstar*’s sharp line, 518 U.S. at 896, between

regulatory legislation that is relatively free of Government self-interest and legislation tainted by a governmental object of self relief.³¹

VI. THE GOVERNMENT IS BARRED FROM RAISING WAIVER OR ESTOPPEL.

A. The United States May Not Rely on Defenses Not Raised by the Contracting Officer.

Defendants assert that Tunica and RNSB acquiesced in Defendants' violations of the ISDA and have consequently waived any right to redress of those violations or are estopped from asserting those rights. *Def. Memo* 48-53, 55-56.

In fact, the record demonstrates no such acquiescence, waiver, or grounds for estoppel.³² But even if it did, the Court does not have jurisdiction to address these defenses because they were not grounds for the decisions by the Contracting Officers. *See* Dkt. No. 13, Exhs. D & F (Contracting Officers' decisions).

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

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

³¹ Moreover, each ISDA contract provides a specific rule for clarification of ambiguities: they are to be resolved in the contractor's favor. 25 U.S.C. § 450l, *Model Agreement* sec. 1(a)(2).

³² *See* Argument VII, below, at 35 *et seq.*

negotiate a settlement). Accordingly, we conclude that this court lacks jurisdiction over the government's counterclaims and defenses . . . because they have not been the subject of final decisions by the contracting officer.

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

See also this Court's discussion of *Foley. Amd. Opinion* (Dkt. No. 48), at 14-15.

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

In presenting an omnibus preliminary attack that could have been presented three years ago, Defendants violate Rules 12(g) and 12(h)(2), F.R.Cv.P, and prejudice Tunica and RNSB.

The government is precluded from raising *in a second motion to dismiss* new Rule 12(b)(6) affirmative defenses that it could have raised but did not raise in its first motion to dismiss. *Albany Insurance Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909-11 (5th Cir. 1993); 2 Moore's Federal Practice ¶ 12.21, at 12-24 (3d ed. looseleaf 2005). See *Seretse-Khama v. Ashcroft*, 215 F.Supp.2d 37, 40 n. 8 (D.D.C. 2002). The government did not raise acquiescence, waiver, or estoppel in its first motion to dismiss.

VII. PLAINTIFFS DID NOT ACQUIESCE IN THE GOVERNMENT'S VIOLATIONS OF THE INDIAN SELF-DETERMINATION ACT.

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

But the government equally agreed in the contracts to full payment of CSC. As discussed above, section 1(a)(1) of the Model Agreement, 25 U.S.C. § 450l(c), expressly incorporates the provisions of Title I of ISDA. Sections 450j-1(a)(2) and (g) of title 25, requiring full payment of

CSC, are part of Title I of ISDA. Section 1(b)(4) of the Model Agreement likewise requires full payment of CSC.³³ Therefore, the obligation of the United States to pay full CSC is incorporated into each and every one of Tunica's and RNSB's contracts.

The United States continuously and knowingly acquiesced in the inclusion of this obligation in each of those contracts, which it executed year after year. (Indeed, it enacted the legislation requiring the inclusion of these provisions.) The United States accepted the benefits of Tunica's and RNSB's performance of the Secretary's health-care obligations under those contracts year after year. Under these circumstances, the law of waiver and estoppel *as argued by Defendants* would equally prevent the United States from presenting any claim that Tunica and RNSB are not entitled to full payment of CSC.

When there are conflicting provisions within a contract, the rules of construction set out in the contract itself govern: Each provision of ISDA and each provision of the contract "shall be liberally construed for the benefit of the Contractor to transfer the funding" 25 U.S.C. § 450l(c), *Model Agreement*, sec. 1(a)(2). *See also id.*, *Model Agreement*, sec. 1(d)(1)(A) (confirming trust responsibility of United States); secs. 1(d)(1)(B) and (d)(2) (obligations of Secretary to act in good faith); *RNC v. Lujan*, 112 F.3d at 1461 (applying Indian canon of construction to resolve ambiguity in ISDA).³⁴

³³ Model Agreement § 1(b)(4) in combination with § 450j-1(g) requires the Secretary to "add[] . . . to the [Secretarial] amount contract support" determined pursuant to section [450j-1(a)]. In turn, the amount to be added for contract support is "the amount for the reasonable costs which must be carried on" to fulfill the contract. As decided in *RNC v. Lujan*, the A-87-based amount does not correspond to this directive.

³⁴ Moreover, the rule of contra preferentem requires that any ambiguity be resolved against the drafting party. *Mastrobuona v. Shearson Lehman Hutton*, 614 U.S. 52, 60, 115 S. Ct. 1212 (1995).

Even were waiver or estoppel applicable, the agreements were forced on Tunica and RNSB by circumstances and in no way rose to the level of indifference, neglect, and knowledge required to apply the doctrines.³⁵ “A party’s reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract should not ordinarily lead to a waiver of the innocent party’s rights.” 13 Williston on Contracts § 39.35, at 655 (4th ed. 2000). Acceptance of part payment of contract debt does not waive right to remainder.

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

Tunica’s and RNSB’s rights to full payment of CSC are set out in ISDA. 25 U.S.C. § 450j-1(a)(2) and (g). Even if Tunica and RNSB had knowingly, intelligently, intentionally, and explicitly waived those rights – and they certainly did none of those things – the equitable doctrine of waiver cannot trump a statutory right. The right of contractors to full CSC is not a mere private right; it is a right that Congress conferred because it is in the public interest. To allow ISDA contractors to waive or bargain away their right to full payment of CSC is contrary to the public interest, as that would reduce the level of health services provided to Indians below the level at which the Secretary would have provided those services. Any such waiver is unenforceable. *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704-05, 65 S.Ct. 895 (1945) (employees’ written waiver of right to liquidated damages under Fair Labor Standards Act not

³⁵ And, in fact, the Government told Tunica that “the United States Office of the Inspector General has instructed the Indian Health Service to refrain from signing contracts that demonstrate disagreement. . . . *Signing an AFA that does not contain the objectionable language would not affect any statutory claim that Tunica-Biloxi might have. . . .*” Ralph W. Ketcher, Jr., Acting Senior Contracting Officer, Indian Health Service, letter to Earl J. Barbry, Sr., Tribal Chairman, Tunica-Biloxi Tribe (Jan. 29, 2001) (Dkt. No. 21, Att. 6, exh. 4) (emphasis added).

enforceable).

. . . In cases in which a breach of law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal. . .

LaBarge Products, Inc. v. West, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995).³⁶

The contracts here were contracts of adhesion and are subject to reform under the CDA. *New Valley Corp. v. United States*, 119 F.3d 1576, 1579-80 (Fed. Cir. 1997) (government contract contains implied covenant of good faith and fair dealing and government is under duty to advance reasonable contract expectations of contracting party; contract must be interpreted in a manner that preserves its intent and does not destroy it; exculpatory clause drafted by the government must be strictly and narrowly construed; waiver applies only where government has used its best efforts to fulfill the reasonable expectations of the contractor).

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

LaBarge Products, Inc., 46 F.3d at 1552.

The government not only ignores the plain fact that ISDA is a remedial statute which

³⁶ *Accord, Tompkins v. United Healthcare*, 203 F.3d 90, 98 (1st Cir. 2000) (party cannot waive application of preemption provisions of Employee Retirement Income Security Act); *Carter v. Exxon Co.*, 177 F.3d 197, 210 (3d Cir. 1999) (gas station franchisees cannot waive protections granted by federal Petroleum Marketing Practices Act); *Haghighi v. Russian American Broadcasting Co.*, 173 F.3d 1086 (8th Cir. 1999) (inclusion of statutorily-required language in settlement agreement cannot be waived; applying Minnesota law); *Stampco Construction Co. v. Guffey*, 572 N.E.2d 510, 513 (Ind. Ct. App. 1st Dist. 1991) (employee in employment agreement cannot waive benefits of prevailing-wage statutes; “[a]llowing settlement or release of a claim would permit unscrupulous contractors to force employees to submit to economic pressures and accept lower wages”). See 15 Corbin on Contracts § 88.7, at 595 (rev. ed. 2003).

contains specific commands to *include in each contract* full CSC needed to maintain program levels, 25 U.S.C. § 450j-1(a)(2) and (g), but it does so in the context of a trust responsibility and the prior class-wide adjudication of the same issue. *RNC v. Lujan*, 112 F.3d at 1463.

None of the cases cited by Defendants, in particular *Hermes Consolidated, Inc. v. United States*, 58 Fed. Cl. 409 (2003), *reversed sub nom. Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005), involves any comparable statute making the contractor the beneficiary of the services it is to perform or involves a trust relationship. *See, e.g., LaBarge Products, Inc.*, 46 F.3d at 1552 (“However, if the government officials make a contract they are not authorized to make, in violation of **a law enacted for the contractor’s protection**, the contractor is not bound by estoppel, acquiescence or failure to protest”; emphasis added). The government places principal reliance on *Hermes Consolidated, Inc.* That decision dealt with a “sophisticated government contractor” which had successfully bid for a series of commercial profit-making contracts to supply military jet fuel over a six year period from 1988 to 1994. The contractor, Wyoming Refining Co., waited 14 years to go to court; presumably earned profits, *id.* at 413; and never complained about the price adjustment clause declared illegal by *MAPCO Alaska Petrol. Co. v. United States*, 27 Fed. Cl. 405 (1992). The court found that the clause in question was “promulgated for the mutual benefit of both the government and the contractor” and that “[w]hile characterized as ‘illegal’ or ‘unlawful’” it was better termed as “unauthorized”. *Hermes*, 58 Fed. Cl. at 419. On appeal, the Federal Circuit reversed the *Hermes* decision, overruling the *MAPCO* finding that the clause was illegal (but not *MAPCO*’s holding that a contract clause violating a statute cannot be waived). 405 F.3d at 1348-1349. *See* discussion of *Seldovia*, at 45, *infra*.

Unlike the Wyoming Refining Co., Tunica and RNSB have vigorously sought reform of their indirect costs to comply with *RNC v. Lujan*. Dkt. No. 110, exhibit 2 (3d Burke Decl.), ¶¶ 7-8, 36 & exhs. 7, 8; *id.*, exhibit 3 (2d Martinez Decl), ¶¶ 5-7 & exh. 1.

B. The Text of ISDA Precludes Contractor Waiver of Statutory Rights.

Defendants point to no express waiver by Tunica and RNSB of their statutory rights. Rather, they maintain that Tunica and RNSB failure to reject the AFA and its offer of funds at an amount less than the funding required by statute implies waiver of any claim to the statutorily-mandated amount. ISDA does not permit such an implication.

ISDA contains a number of provisions authorizing, and providing a mechanism for, the Secretary to waive applicable regulations *when so requested in writing by a tribe*. In 25 U.S.C. § 450k(e), Congress provided that

The Secretary may . . . waive regulations if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this subchapter and is not contrary to statutory law. In reviewing each request, the Secretary shall follow [declination procedures].

Similarly, in a section applicable to self-determination compacts, 25 U.S.C. § 458aaa-11(b)(2), ISDA provides that “Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation . . . the Secretary shall either approve or deny the requested waiver in writing.” *See also* 25 C.F.R. Part 900, Subpart K (“*Waiver Procedures*”). There is even authority for tribes to agree to what would otherwise be inapplicable agency rules or policies, provided they do so expressly in the compact or funding agreement. 25 U.S.C. § 458aaa-16(e) (applying to ISDA self-governance compacts).

But there is *no* ISDA provision for tribal contractors to waive *statutory* rights. Because

Congress has expressly and thoroughly considered waiver in the statute, and limited it to specific parties and subjects, ISDA must be deemed to preclude its general application beyond those subjects. *See, e.g., Christianson v. Harris County*, 529 U.S. 576, 583, 120 S. Ct. 1655 (2000) (“When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode”); *K.P. Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118, 125 S. Ct. 542 (2004) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (Citations and internal editing omitted.))

Importantly, then, the statute does not allow waiver of statutory rights. In those few instances where Congress has allowed waiver, Congress created a procedure requiring the waiver to be expressed in writing by the tribal contractor and the express agreement of the Secretary. If Congress intended to protect tribal contractors from attempts by the Secretary to waive regulations unilaterally or by a contractor to waive regulations inadvertently, than certainly it is a far leap to infer that Congress intended to allow an implicit waiver of the statute itself. Moreover, Congress established a clear test for waiver of regulations. The Secretary may waive regulations only when the “waiver is in the best interests of the Indians served by the contract or is consistent with the policies of the Act, and is not contrary to statutory law.” 25 U.S.C. § 450k(e). To imply a waiver of the statute here would go far beyond what is permitted in the statute and would violate the very test Congress set out for the waiver of regulations: it would subject contractors to a waiver that is inconsistent with the statute and with their own best interest.

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

The Ramah Navajos did not sit on their rights; they have been seeking to enforce the ISDA amendments since they were enacted. The Ramah Navajo Chapter's case (*RNC v. Lujan*) was filed in 1990. It is, moreover, disingenuous for IHS to charge Tunica and RNSB with a knowing and intentional waiver of rights when in 2001 IHS said:

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

U.S. Department of Health & Human Services, Indian Health Service Issue Summary: *Contract Support Costs* (2001) (Dkt. No. 85, exhibit 3). The litigation referred to includes *RNC v. Lujan*, whose invalidation of the indirect cost rate system had sparked creation of the CSC work group referred to in Judge Hansen's findings on remand, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1099 (D.N.M. 1999). That work group included IHS.

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

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

The *Hermes* court noted: "The [Government's] conduct indicates good faith in their attempt to abide by the court's decision in *MAPCO* while seeking conforming changes to the [Federal Acquisition Regulations]." *Id.* at 419. By contrast IHS did nothing to bring its

practices into line with the law. In fact, it ignored the plain command of OMB Circular A-87:

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

Dkt. No. 81, Att. E, ¶E.3 (emphasis added).

Given the nature of ISDA and this specific OMB language, no purposeful intent to waive rights to full CSC can be discerned and no proofs to the contrary have been proffered. Under A-87 it was the government that had an affirmative duty to amend the indirect cost rate agreement following *RNC v. Lujan*. See, e.g., *Centex Corp.*, 395 F.3d at 1310-11 (waiver does not apply where agreement specifically reserves rights).

Neither Plaintiff has caused detrimental reliance since, as shown by *Cherokee*, 125 S.Ct. at 1180, if the Secretary has expended the entire appropriation, damages are recovered from the Judgment Fund. See *RNC v. Babbitt*, 50 F. Supp. 2d at 1095 (Judgment Fund payback of approved settlement under 41 U.S.C. § 612(c) would not be required; court would not allow reimbursement of \$76 million settlement to Judgment Fund from funds appropriated for current BIA programs: “Such a shell game would clearly be inequitable and the Court will retain jurisdiction to ensure that the Government does not engage in such charlatanism. . .”); *Mississippi Band of Choctaw Indians, Appeals of*, Interior Board of Contract Appeals, Nos. IBCA 4711 through 4715, at 6-7 (Apr. 14, 2006)(Exhibit 3 to this Opposition).³⁷

³⁷ In any case, § 612(c) does not require payback when funds to do so are “not available”. In that event the agency must seek additional appropriations. The word “available” is not defined. In a trust context where critical services such as health are involved, “available” must

The defense of waiver fails for the lump sum years (subject of Plaintiffs' concurrent motion for partial summary judgment) for the simple reason the AFAs were all signed well before the May 8, 1997, decision in *RNC v. Lujan*, 112 F. 3d 1455 (10th Cir.),³⁸ the earliest Plaintiffs could be charged with knowledge of the illegality of the rate system. But the defense fails for all years. A-87 acts like the reservation of rights clause in *Centex*, at 1310-11.

The public policy declared by Congress, 25 U.S.C. § 450a(a), (b), to promote Indian self-determination by itself defeats the government's argument.

It defies common sense to infer that Tunica or RNSB intended to abandon or waive their rights to the CSC to which they were entitled under ISDA, especially since they received nothing

be construed to exclude funds needed for on-going programs. In any case the payback provision is an internal government requirement which has been honored more by its breach than its fulfillment: "During fiscal years 2001, 2002, and 2003, federal agencies reimbursed Treasury for fewer than one of every five dollars owed under [the Contract Disputes Act]." U.S. General Accounting Office, JUDGMENT FUND: TREASURY'S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT 1 (GAO-04-481, April 2004). And see Defendants' Amended Response to Interrogatory 10 (Dkt. No. 85, exhibit 4).

³⁸ Tunica's contracts were signed December 30, 1994 for Jan. 1, 1995 – Dec. 31, 1995 (Dkt. No. 13, exhibit I); Jan. 12, 1996, for Jan. 1, 1996 – Dec. 31, 1998 (*id.* exhibit J). AFAs were signed Jan. 12, 1996, for Jan. 1, 1996 – Dec. 31, 1996 (*id.* exhibit J, at 22; repeated, *id.* exhibit N, at 1); and Dec. 3, 1996, for Jan. 1, 1997 – Dec. 31, 1997 (*id.* exhibit J, at 78; repeated, *id.* exhibit N, at 4). Indirect cost rate agreements were signed Dec. 30, 1994 (recited in *id.* exhibit I, at 32); Feb. 4, 1997 (recited in *id.* exhibit J, at 79) and March 5, 1997, for Jan. 1, 1995 – Dec. 1, 1996 (*id.* exhibit J, at 166). This last rate (54.78%) by agreement with the contracting officer was maintained through Sept. 30, 2002) (*id.* exhibit J., at 158, and *id.* exhibit K, at 20, 83).

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

in return. In fact, the statutory benefit was simply snatched away. The idea that a trustee could argue waiver and acquiescence under the circumstances presented here is antagonistic to the “obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities . . .”³⁹ ISDA is designed to enable Indian tribes to get out from under two ineffectual federal bureaucracies and chart their own course *without sacrificing program levels*.⁴⁰

In any case *Seldovia* – decided almost contemporaneously with *Hermes* – settles the issue. Self-determination contractors cannot be held to contract terms which violate a law for their benefit.⁴¹ Despite the fact that *Hermes* balanced the equities in the direction of the government, the IBCA awarded Equal Access to Justice Act attorneys’ fees to *Seldovia*.⁴² Had there been any reasonable question that *Seldovia*’s signing of contracts for an amount less than that to which it was entitled barred the tribe from judicial relief, no EAJA fees could have been

³⁹ That continued use of an illegal system for determining the contract price is voidable by the beneficiary is firmly established. 76 Am. Jur. 2d, Trusts, § 322: “. . . [I]n all matters connected with the trust, a trustee may not, in dealing with the cestui que trust, gain any advantage by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind, and where the transaction involves a breach of trust, it is voidable by the beneficiary.” This rule applies to the contracting officer’s failure to advise Plaintiffs of any duty of exhaustion or the adverse consequences of their actions in signing AFAs based on illegal rates: “The duty of the trustee is to make to the cestui que trust such full disclosure of all facts and circumstances which have come to his knowledge as trustee as to enable the cestui que trust to deal with him on even terms. It is his duty, indeed, to make the beneficiary understand the effect of the transaction.” *Id.* See also *id.* § 341. Defendants waited over three years to raise waiver or acquiescence. The argument and its presentation are unconscionable.

⁴⁰ Sen. Rep. No. 100-274, at 12, 16, 30; Sen. Rep. No. 103-374, at 9.

⁴¹ Moreover, “a provision in a government contract that violates or conflicts with a federal statute is invalid or void.” *American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996).

⁴² *Application for Attorney fees of Seldovia Village Tribe*, Interior Board of Contract Appeals, Nos. IBCA 3862F/97 & 3863F/97, at 3-7 (July 26, 2005) (Dkt. No. 85, exhibit 2).

awarded.⁴³

The Court should not condone what is clearly not the intentional and voluntary abandonment of a right conferred by ISDA in fulfillment of the statutory scheme.

VIII. PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES.

A. Plaintiffs Have Satisfied the Exhaustion Requirements of the Contract Disputes Act.

The Contract Disputes Act requires that claims be initially submitted to the contracting officer to start the resolution process. Here, plaintiff tribal contractors asserted, as a matter of right under ISDA, entitlement to and full payment of CSC, undiminished by the government's unlawful miscalculation of those costs. The legality of the government's calculations is a question of law, which the Court reviews *de novo*. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 997 (Fed. Cir. 1991).

Throughout all periods relevant to this litigation, Tunica and RNSB have each held a mature contract, 25 U.S.C. § 450b(h), with the United States to provide health services that the Secretary of HHS would have otherwise provided. Tunica's first contract dispute challenging Defendant's miscalculations in and manipulations of the indirect cost rate used to calculate the contract price component for IDC was received by the contracting officer on April 5, 2001. Dkt. No. 13, exhibit B. RNSB's first challenge was received by its contracting officer on August 31, 2001. *Id.*, exhibit E.

⁴³ Under EAJA, 5 U.S.C. § 504(a)(1), the Government has the burden of proof to demonstrate that its position was "substantially justified". *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988). The award of fees under EAJA demonstrates that the Government's position was not substantially justified.

Defendants exaggerate details to obscure their statutory duty under ISDA. They parse Plaintiffs' claims into as many small elements as possible, dividing claims by year and by the particular miscalculation or manipulation employed by Defendants, and then complain that they do not know the sum certain damage caused by each miscalculation and manipulation. *See Def. Memo.* 11-12, 17-19. In fact, Tunica and RNSB provided considerable detail in their claims. Dkt. No. 13, exhibits B, C, E; Dkt. No. 110, exhibit 3, exhs. 3, 4. But all they were required to do was request that Defendants carry out their contractual and statutory duties on behalf of the United States to include in the contract price indirect costs in the amounts required by ISDA. In *Health Insurance Plan v. United States*, 62 Fed. Cl. 33 (2004), the court addressed a similar defense by the United States:

... **Because the obligation to fund the contingency reserve and administrative account was well known and flows directly from the government's contractual and statutory duty to collect and pay premiums to its FEHB Program carriers, the government was on notice that this duty would attach were it found to have underpaid premiums to HIP-NY. As such, in the court's view, plaintiff's claims were adequate to satisfy the exhaustion requirements of the CDA.**

...

As to this claim, the issue, therefore, is simply what did the statute, regulations and contracts provide. . . .

Id. at 48-50 (footnotes omitted).⁴⁴

The operative facts in this litigation are entirely those that deal with the proper calculation of indirect CSC. Year-by-year, the claims involve the same contracts and the same

⁴⁴ Plaintiffs recognize that the Court, in its January 22, 2004, amended opinion (Dkt. No. 48), at 13-15, found that, because the IDCs awarded for each fiscal year vary because of changes in prices and the nature of the services each tribe has contracted to provide, a separate claim must be presented each year. In light of the subsequent decision in *Health Insurance Plan* and the other authority herein cited, this ruling should be reconsidered and Plaintiffs respectfully so request.

behavior by Defendants. Once the Court corrects the method of calculation,⁴⁵ what the United States owes each contractor can be determined by simple mathematical operations. *See* 4th Kerkmans Declaration (Exhibit 19 hereto) & accompanying exhibits.

. . . In this regard the Court of Federal Claims said sometime ago that “it would be unreasonable not to allow for the single resolution of a dispute in a final decision on an issue which controls the allowability of an item that will surface . . . throughout the life of the contract.” *Metric Const. Co., Inc. v. United States*, 1 Cl. Ct. 383, 395 (1983).

Holmes & Narver, Inc., ASBCA No. 51430, 99-1 BCA ¶ 30,131, at 149050, 149055, 1998 WL 791850, at *6 (Exhibit 13 to this Opposition). *See also Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (claim increase due to extension of contract for additional years does not need to be resubmitted to contracting officer); *Tecom, Inc. v. United States*, 732 F.2d 935 (Fed. Cir. 1984) (same); *J.F. Shea v. United States*, 4 Cl. Ct. 46, 54 (1983) (requiring resubmission to contracting officer of claim increased during course of litigation would disrupt normal litigation procedure; no CDA jurisdictional bar to presenting evidence of additional damages arising from same claim); *Minuteman Aviation, Inc.*, AGBCA No. 98-201-1, 00-1 BCA ¶ 30,692, 1999 WL 1212544, at *6 (Exhibit 14 to this Opposition) (when complaint alleged entitlement to equitable adjustments on same theory for 1997 and 1998, board of contract appeals had CDA jurisdiction to decide the claim for 1998, notwithstanding that contracting officer’s decision addressed only 1997 costs); *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA 22,595, at 113385, 113386-87, 1990 WL 101600, at *3 (Exhibit 15 to this Opposition)

⁴⁵ Section 14(i) of the CDA, codified at 28 U.S.C. § 1491, grants the Court of Federal Claims jurisdiction over disputes “concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued.” This Court has the same jurisdiction by virtue of 25 U.S.C. § 450m-1(a) and (d).

(additional facts not altering the nature of the original claim, a dollar increase in the amount claimed, or assertion of new legal theory, when based upon same operative facts included in original claim, do not constitute new claims).

In the *Metric Construction* decision cited in *Holmes & Narver, supra*, the court elaborated on why a new dispute need not be submitted to the contracting officer each year:

. . . It was obvious, however, that a ruling by the contracting officer on plaintiff's claim would undoubtedly be followed by the contracting officer if similar claims were presented to him at a later time relative to the same contract. . . .

. . . If defendant's contentions were adopted, it could encourage postponement of the submission of disputes to the contracting officer or, worse still, encourage the submission of a blizzard of claims, one claim filed for each change order modification used. Such a proliferation of claims should be avoided where possible. It would be unreasonable not to allow for the single resolution of a dispute in a final decision on an issue which controls cost allowability of an item that will surface in change orders to be issued throughout the life of the contract.

Metric Construction Co., Inc. v. United States, 1 Cl. Ct. 383, 393-95 (1983) (citation omitted).

No useful purpose is served by requiring resubmission of the same claim to the same contracting officer for each annual funding agreement under the same contract. Whatever the contractors' claims, the contracting officer would still deny on the erroneous ground that ISDA does not require the full amount of IDC to be included in the contract price. *See New South Press*, GPOBCA No. 45-92, 1994 WL 837425, n. 1, at *10 (Exhibit 16 to this Opposition). Nothing in ISDA or the CDA requires such wasteful annual piecemeal litigation.

B. Plaintiffs Are Not Required to Satisfy Exhaustion Requirements Additional to Those of the Contract Disputes Act.

The government also urges that Tunica and RNSB should have challenged the rate-making system directly through the Administrative Procedures Act (APA) or through the

declination procedures, 25 U.S.C. § 450f(a)(2) and 25 C.F.R. § 900.2, and that failure to exhaust constitutes a waiver of “any right to challenge the use or validity of these [indirect cost] rates.” *Def. Memo* 6, 28-29, 50.⁴⁶ But there was no declination process. The initiative for declining a contract rests with the Secretary, not the tribal contractor. *See* 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.2. Resort to this particular administrative process or to judicial review requires a governmental declination. 25 U.S.C. §§ 450f(b), 450m-1(a). An ISDA contractor does not have the power, or the right, to “decline” a contract.⁴⁷ Nor is a contractor required to mount a challenge through an administrative process outside the Contract Disputes Act when the Secretary has already announced in a series of policy statements that he will not fully fund CSC. U.S. Department of Health & Human Services, Indian Self-Determination Policy Memorandum No. 92-02: *Contract Support Cost Policy*, at 7 (Dkt. No. 81, exhibit 13); U.S. Department of Health & Human Services, Indian Health Service Circular No. 96-04: *Contract Support Costs* ¶ 4(4) (Dkt. No. 81, exhibit 14); U.S. Department of Health & Human Services, Indian Health Service Circular No. 2004-04: *Contract Support Costs* 14-21 (Dkt. No. 111, exhibit 33). *See Seldovia*, at 6; Ketcher Deposition, Exhibit 17 hereto, at 19-20.

In any case, exhaustion is excused where futility is apparent. *Honig v. Doe*, 484 U.S. 305, 326, 327, 108 S.Ct. 592 (1988). An agency charged with carrying out trust responsibilities of the United States should not be permitted to find a refuge in bureaucracy. *Flying Horse v.*

⁴⁶ This assertion flies in the face of the express provision in OMB Circular A-87 allowing reopening of any agreement subsequently found to violate a statute. Att. E, ¶ E.3

⁴⁷ Even if a contractor invited declination and the concomitant disruption of services to tribal members, declination can be appealed to federal district court. Defendants’ argument boils down to arguing Plaintiffs should have come into this Court through the left-hand door rather than the one on the right.

United States, 49 Fed. Cl. 419, 428 (Fed. Cl. 2001) (BIA allegation that plaintiffs sent contract dispute to wrong contracting officer was effort to find refuge in bureaucracy).⁴⁸

The Ramah Navajo Chapter commenced its odyssey towards relief from the incorrect rate system by proposing to the Office of Inspector General at Interior (OIG) that its rate omit other federal agencies to the extent they do not reimburse indirect costs. OIG rejected the request. Faced with the choice of abandoning essential services, RNC agreed to the rate produced the incorrect way and signed a contract with BIA incorporating it. RNC then filed a contract dispute under the Contract Disputes Act and, when that was denied, filed suit. 112 F.3d at 1459.

This is the same procedure employed by Tunica and RNSB. Waiver, acquiescence, and estoppel could have been, but were not, interposed in the contracting officer's decision or in the lawsuit which followed. Collateral estoppel should apply to bar relitigation of this issue for the same reasons it does for the claim on the merits.

C. Plaintiffs Are Not Required to Exhaust Remedies to Obtain Equitable Relief for Violation of the Statute.

The first sentence of 25 U.S.C. § 450m-1(a) grants the Court jurisdiction “over any civil action or claim against the appropriate Secretary arising under [ISDA]” and over claims filed for

⁴⁸ Defendants also (1) suggest that Tunica and RNSB should give their programs back to IHS if insufficient funds are provided and (2) record that they didn't, concluding therefrom that the funds provided must have been adequate. *Def. Memo.* 51. First, the IHS tried this defense in *Cherokee*, where the Supreme Court found that a contractor's ability to retrocede a program did not excuse the IHS's failure to include the statutorily mandated CSC in the contract price. 543 U.S. at 638-639. Second, faced with suspending health care services altogether or offsetting missing CSC with program funds or tribal funds, Tunica and RNSB of course chose the latter. IHS has offered no evidence, and could not, that administrative efficiency and program quality were not adversely affected by the missing funds. That IHS should suggest that Tunica's and RNSB's decision to continue serving their members should now be used against them illustrates the extent to which IHS, in developing its litigation position, has lost sight of its mission.

money damages arising under ISDA contracts pursuant to the CDA. The second sentence of § 450m-1(a) authorizes the Court to:

order appropriate relief including money damages, *injunctive relief against an officer of the United States or any agency thereof . . . or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty . . . or to compel the Secretary to award and fund* an approved self-determination contract.

(Emphasis added.).

The Court's authority to order equitable relief or to compel the funding of an approved ISDA contract is independent of the CDA as shown by controlling authority in this Circuit. Defendants rely heavily on *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).⁴⁹ Without mentioning the CDA or exhaustion of remedies, the Court of Appeals there reversed the denial of injunctive relief to two ISDA contractors (one of them the instant plaintiff RNSB) that had alleged arbitrary treatment in provision of IDC. *Id.* at 1341 n.1, 1352. The court noted the broad scope of § 450m-1(a), *id.* at 1344, and did not suggest either that plaintiffs were limited to CDA remedies or were required to exhaust administrative remedies.⁵⁰

IX. PLAINTIFFS' CLAIMS ARE RIPE.

The only remaining jurisdictional defense relevant to this motion not yet decided by this Court or rendered moot by *Cherokee* is the contention that Tunica's and RNSB's claims for certain years are not ripe because Plaintiffs by agreement with the government used rates set in

⁴⁹ Defendants rely on this case for the proposition that the ISDA contract obligation is limited to available appropriations. Plaintiffs disagree strongly. *See pp. 22 et seq., supra.*

⁵⁰ Nor did the court condition relief for the co-plaintiff Puyallup Tribe on its having a current indirect cost rate. *Id.* at 1342 n. 5 & acc. text.

prior years rather than obtain new rates.⁵¹ The government contends that until a given year's rate is reconciled the true extent of damage, if any, is not known.

The government recites that it paid exactly the price for which it contracted.⁵² The CSC component of that contract price was determined by multiplying each Plaintiff's indirect cost rate by its IHS base. Because of Defendants' miscalculations and manipulations of the indirect cost rate system, that contract price was less than it should have been. The indirect CSC component of the contract price required by ISDA is determined by a corrected indirect cost rate multiplied by the IHS base. The damages suffered by Tunica and RNSB are mathematically computable. *See* 4th Kerkmans Decl. (Exhibit 19 to this Opposition) ¶¶ 9-25 & attachments A-C thereto, which notes that Defendants' Statement of Facts is misleading and deceptive because it does not properly account for yearly offsets of over-recoveries.

Tunica and RNSB clearly received less CSC than ISDA requires because the built-in errors of the system for calculating their entitlements ensured they would not recover their needed indirect cost pool. They will receive less in future as well. Even if there were uncertainty as to the amount of damages, a party invoking federal jurisdiction need only satisfy the "irreducible constitutional minimum" of standing: injury-in-fact, causally linked to the alleged unlawful conduct, which is likely to be redressed by a favorable decision of the court.

Humane Society of the United States v. Babbitt, 46 F.3d 93 (D.C. Cir. 1995) (per Silberman, J.),

⁵¹ RNSB has now received new rates effective through FY 2004, reconciling all prior years. Dkt. No. 81, exhibit 4; Dkt. No. 111, exhibit 20. RNSB has also exhausted remedies under the Contract Disputes Act for 1999 through 2003 and has supplemented its complaint accordingly. *See* Minute Order, July 5, 2006. Tunica has applied for a new rate under the current system reconciling all prior years. 3d Burke Decl., suppl. exh. 9 (Dkt. No. 116).

⁵² Dkt. No. 111, Defendants' Statement of Facts ¶¶ 9-10, 14-15, 19-20, 23-24, 27-28, 31-32, 35-36, 41-44, 48-49, 53-54, 58-59, 63-64, 68-69, 73-74, 78-79, 83-84.

citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). That minimum is met by showing present harm or reasonable certainty of future harm from Defendants' actions or threatened actions.

In such circumstances, harm exists whether the accounts at any particular point in time show debits or credits. Either too large an over-recovery or too small an under-recovery carried into future rate calculations is detrimental to the ISDA contractor.

By virtue of incorrect indirect cost rates, whenever established, Tunica and RNSB received less monies for CSC than they would have received had the rates been computed in conformity with law. 4th Kerkmans Decl. ¶¶ 3, 6 (Exhibit 19 hereto). Receiving less money than one is entitled to under a contract meets the *Humane Society* test. Tunica's and RNSB's rates were depressed by inclusion of other federal agencies' programs, thus producing a lower contract price and consequent recovery from the IHS than would have been the case without depression. As the U.S. District Court in New Mexico found, this systematic reduction in rates and resulting diminution of recoveries "produced less than full need for monies required by RNC and the Class members [who included both Tunica and RNSB] to operate the BIA [contracted] programs." *RNC v. Babbitt*, 50 F.Supp.2d at 1097.

Additionally, unless corrected by this Court, Tunica and RNSB are harmed because the depression of rates carries ripple effects. The carry-forward procedure embedded in the common methodology uses the second preceding year's rate as a starting point and adjusts for actual receipts and expenditures for the second preceding year. If the previous year's rate is lower than it should have been, then under-recoveries in that previous year will be understated and over-recoveries will be overstated resulting in a lower rate and contract price in future years as well.

See GAO SHORTFALLS RPT. 70, *et seq.*; 4th Kerkmans Decl. ¶¶ 10-14 (Exhibit 19 hereto).

Since this present and future effect is foreseeable and mathematically determinable, the Court has power to declare the system illegal, reform it, and award damages. See 4th Kerkmans Decl. (Exhibit 19 hereto) & its attachments. This power makes this claim redressable and therefore justiciable. *Minebea Co. Ltd. v. Papst*, 229 F. Supp. 2d 1 (D.D.C. 2002) (future possibility of suit by customers enough to establish ripeness for declaratory judgment purposes in pre-emptive patent infringement dispute); *Jeanette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090, 1093 (D.C. Cir. 1969) (pre-enforcement declaratory review of constitutionality of new statute barring demonstrations and assemblies on Capitol grounds ripe for review).

In *RNSB v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), two ISDA contractors that had not filed new indirect rate proposals within a deadline set by the Secretary challenged the Secretary's reduction of their indirect costs. One of the contractors, the Puyallup tribe, still had no rate proposal. "Puyallup has yet to submit a 1995 indirect cost rate proposal but anticipates that the rate will be substantially the same as its 1994 rate of 35.9%, which would translate into \$359,672 in CSF." 87 F.3d 1342 n. 5 & acc. text. That Puyallup had not submitted a new rate proposal did not give the Court of Appeals pause; it found both plaintiffs had satisfied all four elements for a preliminary injunction protecting the 1995 funds. *Id.* at 1341 n. 1.

Defendants are simply mistaken in their assertion that precise determination of damage must exist for ripeness. *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Dev. Comm.*, 461 U.S.190, 201, 103 S.Ct. 1713 (1983) (challenge by utilities to new state statute requiring disposal facilities for hazardous wastes filed prior to submission of applications for permits to build facilities and prior to denial of permits; held: "One does not have to await the

consummation of threatened injury to obtain preventive relief.”); *Thomas v. Union Carbide Agr. Prods.*, 473 U.S. 568, 580, 105 S.Ct. 3325 (1985) (constitutionality of binding arbitration required by regulatory statute challenged prior to arbitration; held: “hardship to the parties of withholding court consideration must inform any analysis of ripeness”); *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992) (“Of course, a plaintiff need not suffer a completed harm to establish adversity of interest between the parties”). Here the hardship to the parties from the continuation of the now-adjudicated illegal rate-making system is manifest and the absence of adjudication against IHS as to the rate system causes continuing uncertainty and confusion.

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

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

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

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

the requirements of ISDA. *See* 28 U.S.C. § 1361; F.R.Civ.P. 19(a). ISDA specifically authorizes injunctive relief against the Secretary to correct violations of the Act. 25 U.S.C. § 450m-1(a). Secretary Kempthorne's presence in this action is necessary to afford the injunctive relief requested.

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

Instead, Defendants rehash the waiver-acquiescence and ripeness arguments previously addressed. *See* pp. 35-46, 52-56, above. Our response answers the only arguments made for dismissal of the Interior Secretary.

The fixed with carry-forward procedure would be an acceptable means to determine the § 450j-1(a)(2) amount for indirect CSC *if* the rate calculation omitted those other federal agency programs which do not reimburse indirect costs or do so at woefully low rates *and if* Defendants ended their manipulations of the carry-forward system. To correct these defects in the system, Secretary Kempthorne is a necessary party under Rule 20. *Shields v. Barrow*, 17 How. (58 U.S.) 130 (1855) (those who would be joined include “persons having an interest in the controversy, and who sought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy and do complete justice, by adjusting

all the rights involved in it.) *Shields* is cited with approval in 7 Wright, Miller & Kane, Federal Practice & Procedure, Civil § 1604, at 39 (3d ed. 2001).

CONCLUSION

The principal cases *Cherokee, RNC v. Lujan*, *Arizona v. Thompson*, and *Seldovia* resolve all issues in Plaintiffs' favor.

FOR THESE REASONS, the Court should deny Defendants' Cross Motion to Dismiss Or In the Alternative for Summary Judgment and should grant Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs also ask the Court to reconsider its ruling on presentment in light of the later decision in *Health Insurance Plan v. United States*.

Respectfully submitted,

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